Boston College Law Review

Volume 21
Issue 1 *Number 1*

Article 2

11-1-1979

1978-1979 Annual Survey of Labor Relations and Employment Discrimination Law

1978-1979 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW*

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*The authors wish to express their appreciation to Professors Richard S. Sullivan and Thomas G. Abram of the Boston College Law School for their encouragement, time, and helpful comments.

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I. NLRB JURISDICTION

A. *Religious Schools:* Catholic Bishop of Chicago

In 1970, the National Labor Relations Board [NLRB or Board] ended its long-standing refusal to assert jurisdiction over non-profit educational institutions. In *Cornell University*, the Board announced, "we shall no longer decline to assert jurisdiction over such institutions as a class."[1] Despite this new assertion of jurisdiction, the Board continued to decline jurisdiction over church-operated schools.[2] The NLRB refused to assert jurisdiction over organizations "primarily religious and noncommercial in character and purpose, whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs."[3] In 1975, however, the Board refined its jurisdictional standard and embarked upon a policy of accepting jurisdiction over church-operated schools which it characterized as merely "religiously associated," rather than as "completely religious."[4] If instruction in the school was not limited to religious subjects, but sought to provide a general education, the NLRB would accept jurisdiction.[5]

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[1] Cornell University, 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970). In that case the Board made the following announcement: "We adhere to the view that the Board has statutory jurisdiction over nonprofit educational institutions whose operations affect commerce. But we shall no longer decline to assert jurisdiction over such institutions as a class." *Id.* at 331, 74 L.R.R.M. 1269.

[2] *See, e.g.*, Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053, 1058, 86 L.R.R.M. 1249, 1250 (1974); Board of Jewish Educ., 210 N.L.R.B. 1037, 1037, 86 L.R.R.M. 1253, 1253 (1974).

[3] Board of Jewish Educ., 210 N.L.R.B. 1037, 1037, 86 L.R.R.M. at 1253 (a nonprofit organization "operated for the sole purpose of furthering Jewish education among the Jewish population in the Greater Washington area"); *see also*, Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053, 1056, 86 L.R.R.M. 1249, 1249 (a nonprofit organization operated for the sole purpose of providing "educational facilities for the study of the Hebrew language, a knowledge of the Jewish religion, and an appreciation of Jewish culture").

[4] In Roman Catholic Archdioses of Baltimore, 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975), the Board, in ordering a representational election for the lay teachers in five Catholic high schools, stated.

> the Archdiocese also contends that the Board should not assert its jurisdiction because of its religious character. However, the Board's policy in the past has been to decline jurisdiction over similar institutions only when they are *completely religious, not just religiously associated*, and the Archdiocese concedes that instruction is not limited to religious subjects. That the Archdiocese seeks to provide an education based on Christian principles does not lead to a contrary conclusion. Most religiously associated institutions seek to operate in conformity with their religious tenets.

Id. at 250, 88 L.R.R.M. at 1171 (emphasis added). *See also*, Roman Catholic Archbishop of the Archdiocese of Los Angeles, 223 N.L.R.B. 1218, 1218, 92 L.R.R.M. 1114, 1116 (1976).

[5] *See, e.g.*, Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 249, 88 L.R.R.M. 1169, 1170 (five Catholic high schools whose instruction was not limited solely to religious education); and Roman Catholic Archbishop of the Archdiocese of Los Angeles, 223 N.L.R.B. 1218, 1218, 92 L.R.R.M. 1114, 1116 (twenty-six Catholic high schools which perform in part the secular function of educating children, and in part concern themselves with religious instruction).

The Board's "completely religious"/"religiously associated" dichotomy remained unscathed until 1977. In that year, the District Court for the Eastern District of Pennsylvania, in *Caufield v. Hirsch*,[6] ruled that the NLRB's assertion of jurisdiction over "religiously associated" schools violated the first amendment[7] principle of separation of church and state.[8] The court noted that the "secular characteristics of the schools are so intertwined with the schools' religious mission, that they blend imperceptibly one into the other."[9] The *Caufield* court concluded that the Board's attempt to regulate those schools with substantial secular activity could interfere with the schools' exercise of religious freedom guaranteed under the first amendment, and therefore was invalid.[10]

During the *Survey* year, the Supreme Court directly confronted this conflict presented by the NLRB policy and the district court's decision. In *NLRB v. Catholic Bishop of Chicago*,[11] a closely divided Court held that the National Labor Relations Act[12] [NLRA or the Act] does not give the NLRB jurisdiction over lay teachers in church-operated schools that teach both religious and secular subjects.[13] Significantly, the Supreme Court settled the potential conflict between the NLRB's jurisdiction and the first amendment by a narrow interpretation of the NLRA provisions and, therefore, did not reach the constitutional issues presented by the case.

The dispute in *Catholic Bishop* involved lay teachers at two groups of Catholic high schools who petitioned the NLRB to hold representation elections at their places of employment.[14] These religiously-sponsored high schools sought to provide a traditional secular education, but oriented to the tenets of the Roman Catholic faith; religious training at the schools was mandatory.[15] The schools challenged the Board's exercise of jurisdiction over

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[6] No. 76-279, 95 L.R.R.M. 3164 (E.D. Pa. 1977).

[7] The first amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[8] *Id.* at 3169-79.

[9] *Id.* at 3176.

[10] *Id.* at 3179. The court stated:

> The entangling relationships which can arise under the NLRA appear in a wide variety of ways. Because they may result in numerous conflicts and confrontations between the NLRB and the church schools, they are, in my mind, excessive and, therefore, not permissible within the meaning of the first amendment.

Id.

[11] 440 U.S. 490 (1979).

[12] 29 U.S.C. §§ 151-169 (1976).

[13] 440 U.S. at 507.

[14] *Id.* at 493.

[15] One group of schools is operated by the Catholic Bishop of Chicago. *Id.* at 492. These schools have been termed "minor seminaries" because of their role in educating high school students who may desire to become priests. *Id.* While at one time these schools took only those students who had manifested a confirmed desire to become priests, the school policy no longer requires such a definite inclination toward priesthood. *Id.* Now the students need only to be recommended by a parish priest as having a potential for priesthood. *Id.* In addition to providing special religious instruction not offered in other Catholic secondary schools, the schools also offer essentially the same college preparatory curriculum as public secondary schools. *Id.*

their employment practices on both statutory and constitutional grounds.[16] The Board rejected these jurisdictional arguments, explaining that its policy was to decline jurisdiction over church-operated schools "only when they are completely religious, not just religiously associated."[17] Because neither group of schools fell within the Board's "completely religious" category, the Board ordered elections,[18] in which the unions prevailed.[19] When the schools refused to recognize or to bargain with the unions, the schools were found guilty by the Board of unfair labor practices.[20]

The schools challenged the Board's orders in petitions to the Court of Appeals for the Seventh Circuit.[21] That court concluded that, from the initial act of certifying a union as the bargaining agent for lay teachers, the Board's actions impinged upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion.[22] The appeals court reasoned that if a church-run school is required by the first amendment to finance its activities without government aid because of religious permeation of its curriculum, then that same school also should be free of

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The other group of schools is operated by the Diocese of Fort Wayne-South Bend. *Id.* Unlike the schools operated by the Bishop of Chicago, the special recommendation of a priest is not a prerequisite for admission. *Id.* at 492-93. Like the Bishop of Chicago's schools, however, these schools seek to provide a traditional secular education but oriented to the tenets of the Roman Catholic faith; religious training is also mandatory. *Id.* at 493.

[16] The schools challenged the NLRB's assertion of jurisdiction on two grounds: (a) that they do not fall within the Board's discretionary jurisdictional criteria; and (b) the religion clauses of the first amendment preclude the Board's jurisdiction. *Id.*

[17] Catholic Bishop of Chicago, 220 N.L.R.B. 359, 359, 90 L.R.R.M. 1225, 1225 (1975), *citing* Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975). The decision concerning the Diocese of Fort Wayne-South Bend, Inc., is not reported. *Catholic Bishop*, 440 U.S. at 493 n.6.

[18] Catholic Bishop of Chicago, 220 N.L.R.B. at 360, 90 L.R.R.M. at 1226. The decision concerning the Diocese of Fort Wayne-South Bend, Inc., is not reported. *Catholic Bishop*, 440 U.S. at 493 n.6.

[19] *Catholic Bishop*, 440 U.S. at 494.

[20] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1223, 92 L.R.R.M. 1553, 1553 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1229, 92 L.R.R.M. 1550, 1551 (1976).

[21] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 95 L.R.R.M. 3324 (7th Cir. 1977).

[22] *Id.* at 1118, 95 L.R.R.M. at 3329. The court of appeals explained:

> At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an "integral part of the religious mission of the Catholic Church," *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971), courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature.

Id. "The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools." *Id.* at 1124, 95 L.R.R.M. at 3334.

the inhibiting impact of the restrictions of the NLRA.[23] Both the free exercise and the establishment clauses of the first amendment, the court concluded, must foreclose the Board's jurisdiction over church-run schools.[24] Thus, the court of appeals denied enforcement of the Board's orders.[25]

The Supreme Court granted certiorari.[26] The Chief Justice, writing for a closely-divided Court, affirmed the court of appeals' decision, but on different grounds.[27] The analysis of the Court began with the proposition that "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."[28] Accordingly, the Court determined that if it should find that the Board's exercise of jurisdiction would give rise to serious constitutional questions, there must be shown "the affirmative intention of Congress clearly expressed" before a conclusion that the NLRA grants such jurisdiction would be warranted.[29]

In the next step of its analysis, the Court concluded that the Board's exercise of jurisdiction over church-operated schools would, in fact, involve serious first amendment questions.[30] Looking to the Supreme Court decision of *Lemon v. Kurtzman*,[31] the Court noted that even in merely religiously associated schools "[r]eligious authority necessarily pervades the school system."[32] The Court also noted that in this system teachers play a "key role."[33] Since teachers are central to the operation of the school system, the Court concluded that the Board's assertion of jurisdiction on their behalf would create an impermissible risk of excessive governmental entanglement in

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[23] *Id.* at 1130, 95 L.R.R.M. at 3339. The court noted that "an evenhanded approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools should not now be any less effective to ward off the inhibiting effect of governmental regulation here involved." *Id.* at 1131, 95 L.R.R.M. at 3340.

[24] *Id.*

[25] *Id.* Circuit Judge Sprecher, writing a concurring opinion, added:

> [T]he National Labor Relations Board, in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses, has collided with one and fallen into the other. The Board's assertion of jurisdiction will have the effect of inhibiting the practice of religion by regulating it, yet by conceding that this will inexorably force it to "accommodate" and prefer religious employers and conversely to discriminate against secular employers in like situations, it will in the constitutional sense "establish" the religions with which it deals.

Id.

[26] NLRB v. Catholic Bishop of Chicago, 434 U.S. 1061 (1978).

[27] *Catholic Bishop*, 440 U.S. at 507. The Chief Justice was joined by Justices Stewart, Powell, Rehnquist, and Stevens.

[28] *Id.* at 500, *citing* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[29] 440 U.S. at 501.

[30] *Id.* at 501-04.

[31] 403 U.S. 602 (1971).

[32] *Catholic Bishop*, 440 U.S. at 501 (quoting *Lemon*, 403 U.S. at 617).

[33] The Court pointed out: "The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of church-operated schools." 440 U.S. at 501.

the affairs of church-operated schools.[34] For example, any exercise by the Board of its broad investigatory powers would allow that agency to focus upon the internal and constitutionally protected affairs of the religious employer.[35] Further, because nearly everything that happens in a school affects the teachers, the mandatory duty to bargain over "conditions of employment" would represent an encroachment upon the former autonomous position of religious management.[36] The Court concluded, therefore, that an exercise of jurisdiction would raise serious constitutional questions.

Because there exists a significant risk of constitutional infringement, the Court, in the last phase of its analysis, turned to an examination of the NLRA to determine whether it must be read to confer jurisdiction over church-run

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[34] *Id.* at 504.

[35] The Court explained:

> The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.
>
> Moreover, it is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religous schools. 559 F.2d at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.

Id. at 502 (footnote omitted).

[36] The Court summarized the problems involved in the duty to bargain over "conditions of employment" as follows:

> The Board will be called upon to decide what are "terms and conditions of employment" and therefore mandatory subjects of bargaining. See 29 U.S.C. § 158(d). Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining. The Oregon Court of Appeals noted that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment.' " *Springfield Education Ass'n v. Springfield School Dist. No. 19*, 24 Ore. App. 751, 759, 547 P.2d 647, 650 (1976).
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> The Pennsylvania Supreme Court aptly summarized the effect of mandatory bargaining when it observed that the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." *Pennsylvania Labor Relations Board v. State College Area School Dist.*, 461 Pa. 494, 504, 337 A.2d 262, 267 (1975). *Cf. Clark County School Dist. v. Local Government Employee-Management Relations Board*, 90 Nev. 442, 447, 530 P.2d 114, 117-18 (1974). See M. Lieberman & M. Moskow, COLLECTIVE NEGOTIATIONS FOR TEACHERS 221-47 (1966). Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the

schools.[37] Looking to the NLRA[38] and its legislative history,[39] the Court found no "affirmative intention of Congress clearly expressed" to conclude that the Act covers church-operated schools. Accordingly, the Court declined to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the first amendment religion clauses.[40] Thus, the Court held that the NLRA does not give the Board jurisdiction over lay teachers in church-run schools that teach both religious and secular subjects.[41]

A dissenting opinion was filed by Justice Brennan.[42] The dissent began by expressing concern that the Court's attempt to avoid unnecessary constitutional decisions by requiring a "clear expression of affirmative intention of Congress" allows the Court "virtually [to] remake congressional enactments."[43] While the dissenting justices agreed that statutes should be construed to avoid unnecessary constitutional issues,[44] these justices believed that the correct canon for construing statutes wherein constitutional questions may lurk is: "[w]hen the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided."[45] Analyzing the case under this standard of statutory construction, the dissent concluded that the interpretation announced by the Court is not "fairly possible," since the Court's construction is "plainly wrong in light of the Act's language, its legislative history, and this Court's precedents."[46]

The dissenting opinion maintained that the instant situation was clearly encompassed within the provisions of the NLRA. Section 2(2) of the NLRA,[47]

Board, or conflicts with negotiators for unions.

Id. at 502-03.

[37] *Id.* at 504-07.

[38] *Id.* at 504. Interestingly, the Court concluded that there is no clear expression of an affirmative intention to include church-run schools within the jurisdiction of the Board, without ever quoting or citing to the relevant jurisdictional provisions of the NLRA. Compare the analysis of the dissent; see text and notes at notes 47-49 *infra*.

[39] For discussion of relevant legislative history, *see* 440 U.S. at 504-06.

[40] *Id.* at 507.

[41] *Id.*

[42] *Id.* at 508. Justice Brennan was joined by Justices White, Marshall and Blackmun. *Id.*

[43] Justice Brennan explained:

> The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. *Ante*, at 504. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments.

Id. at 509.

[44] *Id.* at 508-09.

[45] *Id.* at 510 (quoting Machinists v. Street, 367 U.S. 740, 749-50 (1961) (emphasis in original)).

[46] 440 U.S. at 508, 511.

[47] 29 U.S.C. § 152 (1976).

the dissent noted, specifically limits the exceptions to the term "employer."[48] The dissenting justices noted that the NLRA, therefore, must cover all employers except those falling within one of the eight express exceptions, none of which excludes church-run schools.[49] The dissenting justices also believed that the legislative history of the NLRA supports this clear import of the board statutory definition of "employers."[50] The dissent also claimed that the Court's interpretation is contrary to its own precedents.[51] Earlier cases, the dissent pointed out, had consistently held that in passing the NLRA, Congress intended to vest in the Board the fullest jurisdictional breadth constitutionally permissible under the commerce clause.[52] Thus, as long as an employer was within the reach of congressional power under the commerce clause, that employer would be covered by the NLRA regardless of the nature of his activity.[53]

Hence, the dissent would hold that the NLRA includes within its coverage lay teachers employed by church-operated schools, and that the constitutional questions presented under the first amendment should be reached.[54] The dissenting justices, however, did not then address these constitutional issues. The dissent failed to discuss these issues because the Court did not do so.[55]

The implications of the *Catholic Bishop* decision with regard to NLRB jurisdiction over lay teachers in church-operated schools are apparent. The Court has settled the lower courts' uneasiness with the constitutional aspects of the NLRB's "completely religious"/"religiously associated" test, by holding that the NLRA does not give the Board jurisdiction over lay teachers in church-run schools that teach both religious and secular subjects. Beyond church-operated schools, however, the ramifications of *Catholic Bishop* on the NLRB's jurisdiction are not quite as clear. As was mentioned by the dissenting justices, the Court has broken its own line of precedent which had construed the NLRA as conferring jurisdiction over all employers (except those specifically excluded in the section 2(2) definition of "employer"), provided they are within the reach of congressional power under the commerce clause.[56] After

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[48] 440 U.S. at 511. Section 2(2) provides that the term employer shall include:

> any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than one acting as an employer), or anyone acting in the capacity of an officer or agent of such labor organization.

29 U.S.C. § 152 (1976) (emphasis in dissenting opinion).

[49] 440 U.S. at 511.

[50] *Id.* at 511-16.

[51] *Id.* at 516.

[52] *Id., citing* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963); Guss v. Utah Labor Bd., 353 U.S. 1, 3 (1956); Polish Alliance v. Labor Bd., 322 U.S. 643, 647-48 (1944); Labor Bd. v. Fainblatt, 306 U.S. 601, 607 (1939).

[53] 440 U.S. at 516.

[54] *Id.* at 517.

[55] *Id.* at 518.

[56] See text and notes at notes 51-53 *supra*. For discussion of section 2(2) of the NLRA which defines employer see text and notes at notes 47-49 *supra*.

Catholic Bishop, that an employer is within the reach of Congress under the commerce clause does not necessarily mean that he is within the jurisdiction of the NLRA, at least where inclusion presents serious constitutional questions. This present policy is a far cry from the all-inclusive interpretation of the NLRA suggested in earlier Supreme Court decisions.

The most significant aspect of *Catholic Bishop*, however, lies outside the labor relations field. As was pointed out in Justice Brennan's dissent, the Court has made a substantial change in the general principle of construing statutes to avoid unnecessary constitutional decisions.[57] The former standard of such statutory construction, according to Justice Brennan, was that statutes would be construed to avoid constitutional questions provided such a construction is "fairly possible."[58] The standard of construction used in the majority opinion, however, states the statutes will be construed to avoid constitutional issues, unless the court can find the "affirmative intention of Congress clearly expressed" prohibiting such a construction.[59] The differences in these two standards of construction are more than semantic. As the division of the Court in *Catholic Bishop* evidences, the majority's new standard gives the courts much more freedom in construing statutes to avoid unnecessary constitutional decisions. The dissenting justices believe that the majority's standard of statutory construction will allow courts "virtually [to] remake congressional enactments."[60] Whether the fears of the dissenters will be realized remains to be seen.

B. *Unemployment Benefits to Strikers:* New York Telephone Co. v. New York State Department of Labor

The preemption doctrine, designed to give effect to the supremacy clause of the Constitution,[1] provides that the Constitution, laws and treaties of the United States shall take precedence over contrary or conflicting state legislation. As such, the doctrine directly reflects the intent of Congress.[2] If Congress indicates in enacting a law that it sees no conflict between that law and

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[57] See text and notes at notes 43-45 *supra*.

[58] See text and note at note 45 *supra*.

[59] See text and note at note 29 *supra*. The same test presumably would apply to the intent of state legislatures where state statutes are involved.

[60] See note at note 43 *supra*.

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[1] The supremacy clause declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

[2] In preemption cases, "[t]he purpose of Congress is the ultimate touchstone." Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963). Even where there is no express preemption, any proper application of the doctrine must give effect to the intent of Congress. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

state legislation, or that it is willing to permit a possible conflict, it cannot be said later that the "supremacy" of the federal law is threatened by the state legislation. In the area of state grants of unemployment benefits to strikers, however, Congress did not indicate a clear intent that the National Labor Relations Act[3] [NLRA or the Act] be exclusive.[4] Thus, this issue has been surrounded with confusion and, in recent years, federal courts have split in determining whether the NLRA implicitly preempts state statutes which provide unemployment compensation to striking workers.[5]

During the *Survey* year, the Supreme Court confronted this issue in *New York Telephone Co. v. New York State Department of Labor*[6] and concluded that the states are free to grant unemployment benefits to strikers.[7] The Court upheld the states' right to provide these benefits to strikers, despite the potential impact such state action may have on the balance of bargaining power between unions and management. While the Supreme Court's resolution of the conflict regarding state grants of unemployment benefits to strikers is clearly noteworthy, the impact of this case on other areas of conflict between state statutes and the NLRA is limited due to the varied approaches taken by the Justices in reaching their decision.

Prior to the *New York Telephone* decision federal courts had struggled to determine, through two conflicting labor preemption approaches and scant legislative history, the status of state statutes granting unemployment benefits to strikers. The basic standard for determining whether state statutes are preempted by the NLRA was established in *San Diego Building Trades Council v. Garmon*.[8] In *Garmon*, the Supreme Court determined that the states may

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[3] 29 U.S.C. §§ 151-169 (1976).

[4] For background on the issue of preemption of unemployment benefits or welfare benefits to strikers, *see* Note, *Federal Preemption of State Welfare and Unemployment Benefits for Strikers*, 12 HARV. C.R.-C.L. L. REV. 441 (1977). For background on labor preemption doctrine in general, *see* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

[5] The holdings in the district courts were far from unanimous. State laws in Hawaii and New York which allowed payment of benefits to strikers under certain circumstances were found preempted. *See* New York Tel. Co. v. New York State Dept. of Labor, 434 F. Supp. 810, 824, 95 L.R.R.M. 2487, 2497 (S.D.N.Y. 1977); Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Indus. Relations, 405 F. Supp. 275, 290, 90 L.R.R.M. 2854, 2865 (D. Hawaii 1976). The state law in Rhode Island, which also allowed payment of unemployment compensation to strikers under certain circumstances, was not found preempted. *See* Grinnell Corp. v. Hackett, 344 F. Supp. 749, 754, 80 L.R.R.M. 3167, 3170 (D.R.I. 1972).

The opinions in the appellate courts on this question also were divided. The Court of Appeals for the First Circuit vacated the trial court's denial of a preliminary injunction and reversed and remanded with instructions concerning the challenge to Rhode Island Unemployment Compensation Law. Grinnell v. Hackett, 475 F.2d 449, 461, 82 L.R.R.M. 2986, 2996 (1973). The Second Circuit also reversed the district court and found the New York Unemployment Compensation Law not preempted. New York Tel. Co. v. New York Dept. of Labor, 566 F.2d 388, 395-96, 96 L.R.R.M. 2921, 2926-27 (2d Cir. 1977).

[6] 440 U.S. 519 (1979).

[7] *Id.* at 545-46.

[8] 359 U.S. 236 (1959). For a discussion of *Garmon*, *see* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1348-51 (1972).

not regulate conduct which arguably is protected or prohibited by the NLRA.[9] Since the NLRA does not protect or prohibit the payment of unemployment benefits to strikers, state statutes do not appear to be preempted. The Court in *Garmon* also established an exception to its basic approach toward NLRA preemption. "Where the regulated conduct touched interests so deeply rooted in local feeling and responsibility" the Court would not infer that Congress had deprived the states of the power to act "in the absence of compelling congressional direction."[10] Because the payment of unemployment benefits may "touch interests deeply rooted in local feeling and responsibility" and because there is an "absence of compelling congressional direction," the states may be free to act. Unions and states argued that under *Garmon* preemption and the deeply rooted in local feeling exception, the states were free to grant unemployment benefits to strikers. This exception, however, has been narrowly construed to apply only to cases in which a state sought to protect its citizens from violence,[11] libel,[12] and intentional infliction of mental distress.[13] Employers, therefore, argued that the deeply rooted in local feeling exception did not sanction state grants of unemployment benefits to strikers.

A second approach to NLRA preemption of state laws was developed by the Court in *Local 20, Teamsters Union v. Morton*[14] and *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.[15] These cases surpassed the *Garmon* approach, by finding that some conduct, which was neither arguably protected nor prohibited by the NLRA, neverthe-

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[9] 359 U.S. at 244-45.

[10] *Id.* at 244.

[11] Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957).

[12] Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 62 (1966).

[13] Farmer v. Carpenters Local 25, 430 U.S. 290, 304-05 (1977).

[14] 377 U.S. 252 (1964). In *Morton*, the Court considered Ohio's attempt to award compensatory damages to an employer for a union's attempt to induce customers and suppliers to cease dealing with their employer during a strike. *Id.* at 253-55. The Union conceded that its activity, which was neither protected by § 7 nor prohibited by § 8 of the NLRA, fell outside of the NLRB's jurisdiction. *Id.* at 258. The Court, however, held the state's award of damages preempted by the NLRA. *Id.* at 259-60. The Court reasoned that such state interference would frustrate a congressional determination to leave this weapon of self-help available to striking employees and thereby would upset the balance of power between labor and management expressed in the NLRA. *Id.*

[15] 427 U.S. 132 (1976). In *Machinists*, the Court reconsidered a Wisconsin Employment Relations Board holding that a union's concerted refusal to work overtime during negotiations was an unfair labor practice according to state law. *Id.* at 135. The Court held the state regulation was preempted by the NLRA, despite the union's conduct being neither protected by § 7 nor prohibited by § 8 of the NLRA, and therefore outside the jurisdiction of the NLRB. *Id.* at 135, 150-51. The Court rested this decision upon a finding that a basic purpose of federal labor law is to strike a balance of power between labor and management (*id.* at 146) through a combination of "protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Id.* at 140 n.4. Therefore, even though Congress had not explicitly regulated such conduct, the state was "denying one party to an economic contest a weapon that Congress meant him to have available." *Id.* at 150. For further discussion of the *Morton* and *Machinists* branch of labor law preemption, *see* Note, *Labor Law–Preemption*, 18 B.C. L. REV. 494 (1977).

less was not subject to state regulation. The Court in *Morton* and *Machinists* determined that Congress intended some conduct to be free from all governmental regulation—both federal and state. In both *Morton* and *Machinists* the Court noted that, "[i]n selecting which forms of economic pressure should be prohibited . . . , Congress [in the Labor Act] struck the 'balance . . . between the uncontrolled power of management and labor to further their respective interests.' "[16] In other words, Congress in the NLRA protected some conduct, prohibited some conduct, and intentionally left some conduct free of regulation. Under *Morton* and *Machinists* the NLRA preempts state regulation in the areas which Congress intended to be free from regulation; in these areas, states may not upset the established balance.[17] While *Morton* seemed to require a case-by-case analysis in which evidence that Congress actually has focused on a particular activity is needed, *Machinists* expanded this analysis into a *per se* rule that Congress will be presumed to have intended all economic self-help activities which it chose not to prohibit to be free of regulation by the states.[18] Under the *Morton* and *Machinists* preemption approach, state provision of unemployment benefits to strikers would be prohibited since the availability or expectation of benefits alters the economic balance of the employer and union.[19]

In addition to an analysis of the two approaches to labor preemption, the issue of federal preemption of state grants of unemployment benefits to strikers involves an analysis of the congressional purpose underlying the Social Security Act. State unemployment compensation statutes are a part of a joint federal-state program under Title IX of the Social Security Act.[20] Accordingly, congressional intent on the preemption issue may be gleaned from that Act.[21] Unfortunately the legislative history of both the Social Security Act and the NLRA are largely silent on the issue of unemployment benefits to strikers.

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[16] *Machinists*, 427 U.S. at 146 (quoting *Morton*, 377 U.S. at 258-59).

[17] 427 U.S. at 150.

[18] *See* Note, *Federal Preemption of State Welfare and Unemployment Benefits for Strikers*, 12 HARV. C.R.-C.L. L. REV. 441, 447 (1977).

[19] *See* New York Tel. Co. v. New York State Dept. of Labor, 434 F. Supp. 810, 813-14, 95 L.R.R.M. 2487, 2489 (S.D.N.Y. 1977); and Hawaiian Tel. Co. v. State of Hawaii Dept. of Labor and Indus. Relations, 405 F. Supp. 275, 282, 90 L.R.R.M. 2854, 2859 (D. Hawaii 1976).

[20] 49 Stat. 639, as amended and recodified as the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq., 42 U.S.C. § 501 et seq., 42 U.S.C. § 1101 et seq. (1976). In broad outline, the federal scheme imposes a tax on employers which the States may mitigate, as all have done, by establishing their own unemployment programs. 26 U.S.C. § 3301 (1976). State programs qualified by the Secretary of Labor are then eligible for federal funds. 42 U.S.C. §§ 501-503 (1976).

[21] It is noteworthy that the NLRA and the Social Security Act were considered in Congress simultaneously, and were enacted into law in the summer of 1935 within five weeks of one another. As Justice Stevens recognized in *New York Telephone Co.*, "[o]ur decision is ultimately governed by our understanding of the intent of the Congress that enacted the National Labor Relations Act on July 5, 1935, and the Social Security Act on August 14 of the same year." 440 U.S. at 527.

The Supreme Court in *Ohio Bureau of Employment Services v. Hodory*,[22] however, analyzed the legislative history of the Social Security Act and determined that an Ohio statute, which disqualified workers for benefits if their unemployment was "due to a labor dispute other than a lockout,"[23] was not preempted by the Social Security Act.[24] Significantly, the Court recognized that in Title IX of that Act, Congress intended the states to have "broad freedom to set up the type of unemployment compensation they wish."[25] The Court further noted that when Congress wished to impose a condition upon state unemployment statutes, it did so in explicit terms.[26] Accordingly, the *Hodory* Court concluded that the absence of congressional legislation on the subject of labor dispute disqualifications in the Social Security Act created an inference that Congress did not intend to restrict the state's freedom to legislate in this area.[27] Therefore, after *Hodory*, states and labor could argue that the states are free to determine for themselves whether to grant unemployment benefits to strikers, because Congress did not expressly forbid them to do so in the Social Security Act.

The Supreme Court attempted to settle this confusion concerning preemption of state unemployment laws in *New York Telephone*.[28] The dispute in *New York Telephone* involved an employer's challenge to New York's unemployment insurance law on the grounds that it was preempted by the NLRA.[29] Under section 590(7) of the unemployment insurance law, the payment of benefits to workers normally is authorized after approximately one week of unemployment,[30] but if a claimant's loss of employment was caused by "a strike, lockout or other industrial controversy in the establishment in which he was employed," section 592(1) will suspend the payment of benefits for an additional seven-week period.[31] The maximum weekly benefit, payable to an employee whose base salary is at least $149 per week, is $75.[32] These benefits are financed primarily through employer contri-

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[22] 431 U.S. 471 (1977). *See also* Batterton v. Francis, 432 U.S. 416 (1977); Stewart Machine Co. v. Davis, 301 U.S. 548 (1937).

[23] 431 U.S. at 473 (citing OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (1973)). It was immaterial that the unemployed worker may not have been involved in that labor dispute. In *Hodory* the plaintiff-appellee, an employee of United States Steel Corp. (USS) at a plant in Ohio, was furloughed when the plant shut down because of a reduction in fuel supply, resulting from a nationwide strike of workers at USS's coal mines. 431 U.S. at 473. The gravamen of the employee's complaint was that because he was not involved in the labor dispute by the mine workers against his employer, he had been involuntarily unemployed, and, therefore, the State could not under the Social Security Act deny him benefits. *Id.* at 475.

[24] *Id.* at 488-89. The Court in *Hodory* expressly declined to consider the preemptive effect of the National Labor Relations Act on the state unemployment benefits statute at issue. *Id.* at 475 n.3.

[25] *Id.* at 483 (citation omitted).

[26] *Id.* at 488.

[27] *Id.* at 488-89.

[28] 440 U.S. 519 (1979).

[29] *Id.* at 522.

[30] *Id.* at 523, *citing* N.Y. LABOR LAW § 590(7) (McKinney Supp. 1978).

[31] 440 U.S. at 523 (citing N.Y. LAB. LAW § 592(1) (McKinney Supp. 1978)).

[32] 440 U.S. at 523. In New York 38,000 members of the Communications Workers of America, AFL-CIO (CWA) remained out on strike against Bell Telephone

butions, based on the benefits paid in past years to former employees.[33] Thus, the challenged provisions of the New York statute had a "two-fold impact" on the bargaining process: not only did these provisions cushion the economic hardship of the workers while out on a lengthy strike, but they also made the strike more expensive for the employer.[34]

Justice Stevens, in a plurality opinion for the Court,[35] acknowledged the district court's finding that the payment of benefits was a "substantial factor" in the employee's decision to strike and to remain on strike,[36] and held that the New York law had altered the economic balance between labor and management.[37] Despite these concessions, however, Justice Stevens found the analysis developed in *Machinists* and *Morton*[38] inapplicable in evaluating the New York statute.[39] The Court's opinion was founded upon the novel belief that since the state statute did not purport to regulate private conduct in labor-management relations directly, but, rather, was a "law of general applicability," the *Morton-Machinists* analysis was not controlling.[40] Justice Stevens found the New York unemployment compensation statute to be a "law of general applicability" on the ground that the general purport of the program, unlike the state's activity in *Morton* and *Machinists*, was not to regulate the bargaining relationship between labor and management but instead to provide an efficient means of insuring employment security in the state.[41] While this alone was not sufficient reason to exempt the statute from preemption, Justice Stevens believed that the Supreme Court's cases "have consistently recognized

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Company affiliates for seven months. *Id.* at 522. After the eight-week waiting period, many striking employees began to collect unemployment compensation. During the ensuing five months more than $49 million in benefits were paid to about 33,000 striking employees at an average rate of somewhat less than $75 per week. *Id.* at 523.

[33] *Id.* at 523-24.

[34] *Id.* at 555-56 (Powell, J., dissenting).

[35] *Id.* at 522. Justice Stevens was joined by Justices White and Rehnquist.

[36] *Id.* at 526. The Court quoted from the district court's opinion:

> Notwithstanding the State's adamant position to the contrary, I regard it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals. This being a truism, one therefore would expect to find confirmation of it everywhere. One does.

Id. at 526 n.5 (citing 434 F. Supp. 810, 813-14 (S.D.N.Y. 1977)). Also, the strike commenced on a nationwide scale when contract negotiations between Communications Workers of America, AFL-CIO and Bell Telephone Company affiliates had reached an impasse. 440 U.S. at 522. While the strike for most workers lasted only one week, in New York, the state which perhaps had gone the furthest in giving unemployment compensation to strikers (for comparison of state unemployment insurance programs, *see* Note, *Federal Preemption of State Welfare and Unemployment Benefits for Strikers*, 12 HARV. C.R.-C.L. L. REV. 441, 456-58 (1977)), the workers remained out on strike for seven months. 440 U.S. at 522.

[37] *Id.* at 546.

[38] For discussion of preemption analysis used in the *Morton* and *Machinists* cases, see text at notes 14-19 *supra*.

[39] 440 U.S. at 533.

[40] *Id.*

[41] *Id.*

that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity."[42]

Justice Stevens also pointed out that the New York unemployment insurance program was designed specifically to comply with Title IX of the Social Security Act of 1935, and thus congressional intent on the preemption issue might also be found by considering that Act.[43] The Court then noted the rationale in *Hodory*,[44] that in enacting the Social Security Act Congress was sensitive to the need to allow the states leeway in fashioning their unemployment programs. The Court determined that it was appropriate to treat the New York statute with the deference accorded general state laws which protect state interests "deeply rooted in local feeling."[45] Accordingly, the Court accepted the standard that " 'in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power' " to establish unemployment compensation programs like that of New York.[46]

Applying this standard, Justice Stevens found no evidence that Congress, which had enacted both the NLRA and the Social Security Act in 1935, intended to deny the states power to act in this area.[47] In fact, he believed that the silence of Congress in 1935 actually supports the contrary inference that Congress intended to allow the states to make the policy determination whether to act for themselves.[48] Central to the Court's analysis was the holding in *Hodory* that Congress in the Social Security Act intended the several states to have broad freedom in setting up the types of unemployment compensation they wished.[49] The Court also mentioned the legislative history of both Acts which showed that Congress had been aware of the problem, but had not given any specific indication of an intent in either the NLRA or the Social Security Act to preempt subsequent state action.[50] The Court concluded, therefore, that a state's power to fashion its own policy concerning the payment of unemployment compensation should not be denied on the basis of speculation about the unexpressed intent of Congress.[51]

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[42] *Id.* (citing Farmer v. Carpenters Local 25, 430 U.S. 290, 302 (1977); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 194-95 (1978); and Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356-57 (1972)).

[43] 440 U.S. at 527. See also text and notes at note 21 *supra*.

[44] For discussion of *Hodory* case, see text and notes at notes 22-27 *supra*.

[45] 440 U.S. at 539-40. For discussion of the "local feeling" exception to labor preemption doctrine, see text and notes at notes 8-13 *supra*.

[46] 440 U.S. at 540 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

[47] 440 U.S. at 540.

[48] *Id.* For a discussion of the relevant legislative histories of the NLRA and Title IX of the Social Security Act, as considered by Justice Stevens' opinion for the Court, Justice Blackmun's concurrence, and Justice Brennan's concurrence, see *New York Telephone Co.*, 440 U.S. at 540-45.

[49] *Id.* at 542. See also text and notes at notes 22-27 *supra*.

[50] *Id.* at 544. See note 48 *supra*.

[51] *Id.* at 545-46.

Justice Blackmun, joined by Justice Marshall, concurred in the judgment of the Court.[52] He began by agreeing that, according to the legislative histories of the NLRA and the Social Security Act, Congress, by its silence, had made a decision to permit the states to pay unemployment benefits to strikers.[53] Justice Blackmun pointed out, however, that the requirement created by the Court that the petitioner demonstrate "compelling congressional direction" to establish preemption of a state law of general applicability was not consistent with the principles laid down in *Machinists*.[54] In Justice Blackmun's opinion the crucial inquiry was not whether the state's purpose was to confer a benefit on a class of citizens,[55] but whether the exercise of state authority "frustrates the effective implementation of the [National Labor Relations] Act's processes."[56] Justice Blackmun did not find the state grant of unemployment benefits to strikers to frustrate the NLRA's processes because of his earlier conclusion that the legislative histories suggest that Congress, by its silence, had intended to tolerate such state action.[57] Thus, he concurred with the result.[58] Finally, although admitting the "deeply rooted in local feeling" exception[59] may in some instances require "compelling congressional direction" to infer preemption, Justice Blackmun noted that this exception has not extended beyond "a limited number of state interests that are at the core of the States' duties and traditional concerns."[60]

Concurring separately in the result, Justice Brennan[61] agreed with Justice Blackmun's conclusion that the legislative histories of the NLRA and the Social Security Act provided sufficient evidence of congressional intent to toler-

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[52] *Id.* at 547.

[53] *Id.* See note 48 *supra*.

[54] *Id.* at 547-48. Justice Blackmun explained:

> This requirement that petitioners must demonstrate "compelling congressional direction" in order to establish pre-emption is not, I believe, consistent with the pre-emption principles laid down in *Machinists* . . . . I believe, however, that *Machinists* indicates that the States are *not* free, entirely and always, directly to enhance the self-help capability of one of the parties to such a dispute so as to result in a significant shift in the balance of bargaining power struck by Congress. Where the exercise of state authority to curtail, prohibit, or enhance self-help " 'would frustrate effective implementation of the Act's processes,' " (citation omitted) I believe *Machinists* compels the conclusion that Congress intended to pre-empt such state activity, unless there is evidence of congressional intent to tolerate it.

Id. at 548-49. This distinction, as Justice Blackmun notes, is not merely semantic; for while Justice Stevens would place assumed priority on the state side in *New York Telephone Co.*, Justice Blackmun would place it on the federal side. *Id.* at 549.

[55] *Id.* at 550. In other words, whether the state statute is a "law of general applicability." See text at notes 40-42 *supra*.

[56] 440 U.S. at 550.

[57] *Id.* at 549-50.

[58] *Id.* at 551.

[59] For discussion of the "local feeling" exception to labor preemption doctrine, see text and notes at notes 8-13 *supra*.

[60] 440 U.S. 550-51 (citing Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (violence); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) (libel); Farmer v. Carpenters Local 25, 430 U.S. 290 (1977) (intentional infliction of mental distress)).

[61] 440 U.S. at 546.

ate state grants of unemployment benefits to strikers.[62] Justice Brennan did not join in the Court's opinion, however, on the grounds that the New York statute may not be a "law of general applicability,"[63] and that although the law may fall within the "deeply rooted in local feeling" exception to preemption,[64] there is no need in this case for such a distinction.[65]

In dissent, Justice Powell, joined by the Chief Justice and Justice Stewart,[66] claimed that the Court's decision substantially altered the balance between labor and management prescribed by the NLRA.[67] As such, the dissent believed that the Court had rewritten the principles of preemption espoused in *Morton* and *Machinists*.[68] Justice Powell's analysis began with the assertion that nothing in the NLRA or its legislative history specifically indicated that the Congress intended to tolerate unemployment benefits for strikers.[69] He then noted that the unemployment compensation statute of New York was not, as the Court opinion claimed,[70] a "law of general applicability."[71] Regardless, Powell agreed with the view expressed in Justice Blackmun's concurring opinion[72] that the crucial inquiry should be whether the application of state law "would frustrate the effective implementation of the NLRA's process,"[73] and further noted that the narrow scope of the "deeply rooted in local feeling" exception[74] would not encompass the challenged provisions of the New York law.[75] The dissent, therefore, concluded

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[62] *Id.* at 546-47. See note 48 *supra*.

[63] Although Brennan agrees with Stevens' opinion for the Court that a different level of scrutiny may, according to past cases, be required when dealing with statutes that regulate private conduct in labor relationships rather than confer public benefits, for the same reasons as stated in Justice Powell's dissent (see note 71 *infra*), Justice Brennan was not sure that the New York unemployment compensation statute was a law of general applicability. 440 U.S. at 546 (in the asterisk footnote).

[64] 440 U.S. at 546-47 (in the asterisk footnote). For discussion of the "local feeling" exception to labor pre-emption doctrine, see text and notes at notes 8-13 *supra*.

[65] "[T]he legislative histories of the NLRA and the Social Security Act reviewed in my Brother Stevens's opinion provide sufficient evidence of congressional intent to decide this case." 440 U.S. at 547. See also note 48 *supra*.

[66] 440 U.S. at 551.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 556. But see note 48 *supra*.

[70] See text at notes 40-42 *supra*.

[71] 440 U.S. at 557. Justice Powell noted:

> Those provisions are "of general applicability" only if that term means—contrary to what the plurality itself says—generally applicable only to labor-management relations. It would be difficult to think of a law more specifically focused on labor-management relations than one that compels an employer to finance a strike against itself.

Id. (footnote omitted).

[72] See text at note 56 *supra*.

[73] 440 U.S. at 558.

[74] For discussion of the "local feeling" exception to labor preemption doctrine, see text and notes at notes 8-13 *supra*.

[75] 440 U.S. at 560. Justice Powell stated: "The provisions of the New York law at issue here have nothing in common with the state laws protecting against personal torts or violence to property that have defined the 'local feeling and responsibility' exception to pre-emption." *Id.*

that the principles of *Morton* and *Machinists*[76] apply, and that a finding of preemption is required, unless in some other law Congress has modified the policy of the NLRA.[77] Looking to the Social Security Act and to its legislative history,[78] the dissent could find no specific indications that Congress intended the states to have authority to upset the NLRA's collective-bargaining processes.[79] In the dissenters' opinion, therefore, preemption was appropriate.[80]

Because the Court's decision against preemption by the NLRA was, for a majority of the justices, based on the determination that Congress had, in the Social Security Act, given great leeway to the states in fashioning their unemployment laws, it is unlikely that *New York Telephone* effects any major changes in labor law preemption outside the area of unemployment compensation. According to a majority of the justices,[81] *Morton-Machinists* principles still apply to state laws of general applicability. While Justice Stevens[82] attempted to imply a state's rights presumption against preemption where the state law in question is one of general applicability, most of the justices would not concur in finding such a presumption. Further, a majority[83] would leave the "deeply rooted in local feeling" exception exactly where it was—applicable only to state laws protecting against personal torts or violence to property. Beyond the area of unemployment compensation, therefore, little is changed in the labor preemption doctrine by the decision in *New York Telephone*.

In the area of state benefits to unemployed strikers, however, the Court has attempted to settle the confusion experienced by the lower courts. As was pointed out by Justice Powell in his dissent,[84] six of the justices hold that New York may require employers to pay unemployment compensation to strikers, after an eight-week waiting period, amounting to some 50% of the workers' average wage. Because the New York statute has the strongest impact upon the balance of bargaining power between labor and management of all state unemployment compensation statutes,[85] it would appear likely that the other states' compensation statutes are not preempted by the NLRA. The question

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[76] For discussion of the preemption analysis used in the *Morton* and *Machinists* cases, see text at notes 14-19 *supra*.

[77] 440 U.S. at 560.

[78] Justice Powell's dissent reviews the legislative histories of the Social Security Act. *See* 440 U.S. at 560-67. But see note 48 *supra*.

[79] 440 U.S. at 566.

[80] *Id.* at 567.

[81] Justices Blackmun and Marshall, see text and notes at notes 52-56 *supra*, Justice Powell in dissent, joined by the Chief Justice and Justice Stewart, see text and notes at notes 66-73 *supra*.

[82] Justice Stevens' opinion for the Court, joined by Justices White and Rehnquist, see text and notes at notes 40-42 *supra*. Justice Brennan agrees that in preemption cases there should be a lesser level of scrutiny for laws of general applicability, but does not find the New York unemployment compensation statute to be such a law. 440 U.S. at 546 (in the asterisk footnote).

[83] Justices Blackmun and Marshall, see text and notes at notes 59-60 *supra*. Justice Powell's dissent, joined by the Chief Justice and Justice Stewart, see text and notes at notes 74-75 *supra*.

[84] 440 U.S. at 565.

[85] For comparison of state unemloyment insurance programs, *see* Note, *Federal Preemption of State Welfare and Unemployment Benefits for Strikers*, 12 HARV. C.R.-C.L. L. REV. 441, 456-58 (1977).

remains, however, whether the state would be free to interfere further in labor relations than as presently provided under the New York statute.[86]

II. Representational and Organizational Activity

A. *Elections*

1. *Union Solicitation:* Beth Israel Hospital

Section 7[1] of the NLRA[2] explicitly provides employees with the right to self-organization. The Supreme Court consistently has interpreted section 7 to protect the right of employees to communicate with one another on the job site regarding union organization.[3] The NLRB (Board) developed a rule which struck a balance between the employees' right to organizational activities at the workplace and the employers' private property rights and right to maintain discipline in their businesses.[4] Under the Board's rule, employer and employee interests are balanced by presuming the validity of employer restrictions on employee solicitation and distribution during working time and in working areas, yet presuming invalid restrictions on employee solicitation and distribution during non-working time and in non-working areas.[5]

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[86] For example, the states could interfere further in labor relations than the New York statute by increasing unemployment compensation to 100% of the worker's average wage and eliminating the additional waiting period imposed where the unemployment is caused by labor dispute.

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[1] 29 U.S.C. § 157 (1976) states in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[2] 29 U.S.C. §§ 151-68 (1976).

[3] *See, e.g.*, Beth Israel Hospital v. NLRB, 437 U.S. 483, 491 (1978); Central Hardware Co. v. NLRB, 407 U.S. 539, 542-43 (1972). The Court in *Central Hardware* noted that:

> [Section 7] organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.

407 U.S. at 543. (citations omitted), *quoted in*, *Beth Israel*, 437 U.S. at 491-92 n.9.

[4] The Court in Republic Aviation Co. v. NLRB, 324 U.S. 793, 797-98 (1945) set out the Board's task:

> [The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place on employer or employee.

Id. at 797-98.

[5] The Board developed the presumption approach in Peyton Packing, 49 N.L.R.B. 828, 843-44, 12 L.R.R.M. 183, 183 (1943), *enforced*, 142 F.2d 1009, 1010, 14 L.R.R.M. 792, 794 (5th Cir. 1944).

In 1974 the NLRA was amended,[6] extending its coverage to non-profit health care institutions. In the *Survey* year the Supreme Court in *Beth Israel v. NLRB*,[7] considered the issue whether employees in health care institutions would be covered by the solicitation and distribution rules developed by the Board for the industrial sector. In *Beth Israel*, the Court upheld a qualified extension of the industrial solicitation and distribution rules to health care institutions.[8]

The solicitation and distribution rules applicable to the industrial sector were established in *Republic Aviation Co. v. NLRB*.[9] The Supreme Court in *Republic Aviation* approved the Board's adoption of a presumption approach,[10] to determine whether employee solicitation and distribution in the workplace was protected by section 7 of the NLRA. Under this approach the Court noted, employer rules prohibiting union solicitation during working hours are "presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose."[11] During non-working time, even though an employee is on company property, a rule prohibiting union solicitation "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline."[12] Employee distribution of organizational material is treated similarly to solicitation. Company rules prohibiting distribution or organizational material in

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[6] The 1974 Health Care Amendments, Pub. L. No. 93-360, 88 Stat. 395 (1974) altered the National Labor Relations Act (NLRA). Section 2(2) was amended by deleting the provision that an employer shall not include "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . ." from the definition of an employer. *Id.* Section 2(14) was added to define a Health Care Institution. *Id.* Section 8(d) was amended by altering the notice requirement for the termination of a contract with a health care institution. 88 Stat. at 396. Section 8(g) was added to prohibit a strike or concerted refusal to work without proper notice. 88 Stat. 396. Section 19 was added allowing employees, who refused to pay dues for religious reasons, to pay an equivalent sum to a nonreligious charity. 88 Stat. 397. And Section 213 was added authorizing the director of the Federal Mediation & Conciliation Service to appoint a Board of Inquiry to investigate a labor dispute in a health care institution. 88 Stat. at 396-97. For a general discussion of these amendments, *see* Feheley, *Amendments to the National Labor Relations Act; Health Care Institutions*, 36 OHIO ST. L.J. 235, 238-40 (1975); Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 NW. U.L. REV. 202 (1975); Comment, *National Labor Relations Act—History and Interpretation of the Health Care Amendments*, 60 MARQUETTE L. REV. 921 (1977).

[7] 437 U.S. 483 (1978). Justice Brennan delivered the opinion of the Court in which Justices Stewart, White, Marshall, and Stevens joined. Justices Blackmun and Powell filed separate opinions concurring in the judgment, in which the Chief Justice and Justice Rehnquist joined. *Id.* at 508, 509.

[8] *Id.* at 507.

[9] 324 U.S. 793, 803-04 & n.10 (1945).

[10] See note 6, *supra.*

[11] 324 U.S. at 803 n.10 (quoting Peyton Packing, 49 N.L.R.B. 828, 843-44, 12 L.R.R.M. 183, 183 (1943).

[12] *Id.* at 804 n.10.

working areas are presumed valid, while restrictions of distribution in non-working areas are presumed to be discriminatory.[13]

The *Republic Aviation* approach for determining the validity of restrictions on employee solicitation and distribution, has been applied consistently by the Board to disputes arising in the industrial sector. The Board has, however, created exceptions for retail establishments and public restaurants, holding that solicitation and distribution may be prohibited at all times from areas where customers have access.[14] The presence of customers heightened the employer's interest in restricting employee solicitation and distribution.[15]

In 1974 the scope of the NLRA was expanded to include health care institutions.[16] Subsequent to the 1974 Health Care Amendments, the Board in *St. John's Hospital & School of Nursing Inc.*,[17] considered the issue of restrictions on employee solicitation and distribution in all health care institutions.[18] The result of *St. John's* was a qualified extension of the *Republic Aviation* presumption approach, to health care institutions. Hospitals were permitted to impose stricter restrictions on employee solicitation and distribution, than would be permitted under the *Republic Aviation* approach.[19] The Board determined that Hospitals could prohibit solicitation by employees "on non-working time in strictly patient care areas, . . ."[20] After *St. John's* the Board's position on solicitation and distribution in hospitals was contained in four rules: (1) A no solicitation rule covering working time would be valid no matter what the area; (2) A no solicitation rule covering non-work time would not be valid except with respect to actual patient care areas; (3) A no distribution rule covering working time would be valid no matter what the area; (4) A no distribution rule covering non-working time would be valid if it covered a

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[13] *See Beth Israel*, 437 U.S. at 493 n.10.

[14] *See id.*, at 493 & n.11. Strict application of *Republic Aviation* would allow employees to solicit and distribute material in customer areas on non-working time.

[15] Employees in retail establishments and restaurants may solicit in non-customer areas.

[16] See note 7, *supra*. Prior to 1974, the *Republic Aviation* approach was applied to proprietary hospitals, but no clear rule emerged from the Board's decisions. In *Summit Nursing and Convalescent Home, Inc.*, 196 N.L.R.B. 769, 80 L.R.R.M. 1069, 1070 (1972), *enforcement denied*, 427 F.2d 1388 (6th Cir. 1973) the Board found a rule prohibiting solicitation or distribution "at any time in the patient or public area within the home or in the nurses' stations," invalid. In *Guyan Valley Hospital, Inc.*, 198 N.L.R.B. 107, 111, 81 L.R.R.M. 1023, 1025 (1973) the Board upheld a no solicitation rule which provided: "There is to be a soliciting in working areas during working hours at this hospital." Finally in *Bellaire General Hospital*, 203 N.L.R.B. 1105, 1108, 83 L.R.R.M. 1291, 1293 (1973) the Board found invalid a rule prohibiting solicitation and distribution "by employees while off duty or during working hours." *See Beth Israel*, 437 U.S. at 494.

[17] 222 N.L.R.B. 1150, 91 L.R.R.M. 1333 (1976), *enforcement denied*, 557 F.2d 1368, 1379, 95 L.R.R.M. 3058, 3066 (10th Cir. 1977).

[18] *Id.*

[19] *Id.*, 91 L.R.R.M. at 1334.

[20] *Id.* Strictly, patient care areas include patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas.

work area or patient care area but would not be valid if it covered a non-working area.[21]

On appeal the Tenth Circuit in *St. John's Hospital & School of Nursing, Inc. v. NLRB*,[22] denied enforcement of the Board's qualified extension of the *Republic Aviation* presumption to health care institutions.[23] Despite the denial of enforcement in the Tenth Circuit, the Board continued to apply its qualified *Republic Aviation* approach to solicitation and distribution issues in Health Care institutions. Thus, in *Beth Israel*, the Board applied the rules developed in *Republic Aviation* and *St. John's* determining that employee solicitation and distribution of organizational material in a hospital cafeteria frequented by employees, patients, and the public was protected activity under section 7 of the Act.[24] The First Circuit slightly modified and enforced the Board's order.[25] The Supreme Court affirmed the decision, upholding the Board's qualified extension of the *Republic Aviation* presumption approach to determine the validity of restrictions on employee solicitation and distribution in health care institutions.[26] Applying the Board's rules the Court held that Beth Israel had not rebutted the presumption of illegality of its restriction.[27] Beth Israel is a significant development in labor law as the presumption of illegality of hospital restrictions on employee solicitation and distribution upheld by the Court provides a strong guarantee of employee rights. Consequently, employee activity in situations where the circumstances are less compelling than *Beth Israel*, will be protected under the presumption approach.[28]

The facts in *Beth Israel* are uncomplicated. Beth Israel is a large nationally recognized hospital located in Boston, which has approximately 2200 regular employees.[29] In July of 1974, the Hospital promulgated a rule prohibiting solicitation and distribution of literature in any area to which patients

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[21] *See* ____. WALTER, THE COURSE OF CHARTED AND UNCHARTED WATERS IN LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 64-65 (1977).

[22] 557 F.2d 1368, 95 L.R.R.M. 3058 (1977).

[23] *Id.* at 1379, 95 L.R.R.M. at 3066. The Court of Appeals for the Tenth Circuit would permit hospitals to prohibit employee solicitation and distribution in patient access areas, such as halls, stairways, elevators and waiting rooms as well as cafeterias and gift shops. *Id.* at 1375, 95 L.R.R.M. at 3061.

[24] 223 N.L.R.B. 1193, 1196-99, 92 L.R.R.M. 1078, 1079.

[25] 554 F.2d 477, 482-83, 95 L.R.R.M. 2230, 2234-35 (1977).

[26] 437 U.S. 483, 488, 495, 507 (1978).

[27] *Id.* at 507. Under the Court's analysis a hospital may rebut the presumption of illegality by showing that the restrictions on employee solicitation and distribution are necessary to avoid disruption of health care operations, or disturbance of patients. *Id.*

[28] The concurring opinions of Justice Blackmun (joined by the Chief Justice and Justice Rehnquist), *id.* at 508, and Justice Powell (joined by the Chief Justice and Justice Rehnquist), *id.* at 509, would have supported the holding of *Beth Israel* on a finding that the restrictions on solicitation and distribution violated section 8(a)(1) based on substantial evidence contained in the record as a whole, rather than adopting the stronger presumption approach of *Republic Aviation*. *Id.* at 508, 510.

[29] *Id.* at 489.

or visitors had access.[30] Because of this rule employees were allowed to solicit other employees and to distribute literature in only six separate locker rooms containing 613 lockers.[31] The locker rooms are restricted on the basis of sex, and generally are not used by the Hospital to communicate messages to the employees.[32] The cafeteria, on the other hand, is the common gathering area for the employees on non-working time.[33] The cafeteria also has vending machines where employees purchase snacks while on coffee breaks. The Hospital allowed the cafeteria to be used for non-union solicitation and distribution purposes.[34] Additionally, the Hospital maintains in the cafeteria an official bulletin board for communicating messages to the employees, and an unofficial bulletin board for use by the employees.[35]

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[30] *Id.* at 486-87. In July of 1974 the hospital promulgated the following rule on solicitation and distribution:

> Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> 1) Employee-only areas—employee locker rooms and certain adjacent rest rooms; and
>
> 2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

Beth Israel, 223 N.L.R.B. at 1195, 92 L.R.R.M. at 1078. After the complaint in *Beth Israel* was filed, the hospital, on March 5, 1975 changed the solicitation rule. The revised rule provided:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to BI employees may be done by other BI employees, when neither individual is on his or her working time, in employee-only areas—employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffeeshop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.
>
> Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.
>
> Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

Id.

[31] 437 U.S. at 489.

[32] *Id.* at 489-90.

[33] *Id.* at 490.

[34] *Id.* The United Way, United Fund, Jewish Philanthropies Organizational Drive, The Israel Emergency Fund, and the Credit Union were allowed to solicit and distribute literature in the Cafeteria. *Id.*

[35] *Id.*

The dispute in *Beth Israel* arose when the union[36] filed a section 8(a)(1)[37] and 8(a)(3)[38] charge with the Board.[39] The union contested both the promulgation of the restriction on solicitation and distribution, and the Hospital's disciplining an employee for violating the restriction on solicitation and distribution.[40] The Board affirmed the findings of the Administrative Law Judge that the Hospital had violated sections 8(a)(1) and (a)(3).[41] The Board ordered the Hospital to cease and desist from interfering with "concerted union activities," and to "rescind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop."[42] On appeal the First Circuit Court of Appeals modified and enforced the Board's order.[43] The Supreme Court affirmed the decision of the First Circuit.[44]

In reaching its decision, the *Beth Israel* Court considered four arguments presented by the Hospital as to why restrictions on employee solicitation and distribution should be allowed in health care institutions.[45] The Hospital had contended first, that the Board's decision to allow solicitation conflicts with congressional policy expressed in adopting the 1974 Health Care Amendments.[46] Second, the Hospital argued that limited judicial review of NLRB decisions is not applicable in this case since the Board has no expertise in

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[36] The Massachusetts Hospital Workers Union, Local 880 Service Employees International Union AFL-CIO. *Id.* at 487 n.3.

[37] 29 U.S.C. § 158(a)(1) (1976).

[38] 29 U.S.C. § 158(a)(3) (1976).

[39] 437 U.S. at 487.

[40] *Id.* at 491. Ann Schuniur was disciplined for distributing a union newsletter in the hospital cafeteria.

[41] 437 U.S. at 487. The Board issued a complaint on the § 8(a)(1) & (3) charges. An Administrative Law Judge found a § 8(a)(1) violation in the adoption of the no solicitation rule and a § 8(a)(3) violation in the disciplining of an employee for violating the rule. *Id.*

[42] *Id.* at 487-88. *See also* Beth Israel, 223 N.L.R.B. 1193, 1199, 92 L.R.R.M. 1078, 1078-79.

[43] 554 F.2d 477, 482-83, 95 L.R.R.M. 2230, 2234-35 (1977). The two portions of the Board order modified by the First Circuit are:

> (1) Cease and desist from disciplining employees or otherwise discriminating against them with regard to their tenure of employment or any other term or condition of employment for engaging in concerted union activities for their mutual aid or protection, or in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.
>
> (2)(b) Rescind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffeeshop.

223 N.L.R.B. at 1199, 92 L.R.R.M. at 1078-79. The First Circuit declined to enforce part one since the record did not show "that the Hospital has a proclivity knowingly to violate the Act, thus justifying a broad order." 554 F.2d at 477, 483, 95 L.R.R.M. at 2234. The First Circuit also modified part 2(b) of the order inserting the words *that part of*, so the order read: "Rescind *that part of* its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffeeshop." *Id.* at 482, 95 L.R.R.M. at 2234. The First Circuit left open the possibility that other parts of the restrictions on solicitation and distribution might be valid. *Id.*

[44] 437 U.S. at 489.

[45] *Id.* at 495-507.

[46] *Id.* at 496.

medical care.[47] Third, the Hospital urged that the Board's decision was irrational and was not supported by the evidence.[48] Finally, the Hospital contended that it was irrational to distinguish a dispute involving a hospital cafeteria from cases involving public restaurants and retail stores.[49] The Court rejected all four of the Hospital's arguments.

In rejecting the contention that the Board's solicitation rule conflicted with the policies underlying the 1974 Health Care Amendments, the Court relied on an interpretation of the legislative history of the amendments which revealed no evidence of congressional intent to treat employees of health care facilities differently from industrial employees in terms of section 7 solicitation and distribution rights.[50] Turning to the Hospital's second argument, that the principle of limited judicial review of Board decisions[51] was inapplicable to this case, the Court acknowledged that the Board was not an expert in medical decisions.[52] The Court, however, deferred to the Board's expertise in labor-management relations under federal labor law, and not to the Board's expertise in specific occupations. The Hospital's concern that the Board was not medically expert was irrelevant to the deference granted to the Board's expertise in national labor relations policy.

The Court reviewed the records of the case and rejected the Hospital's third argument that the Board decision was irrational.[53] The Court noted that the Hospital "was unable to introduce *any* evidence to show that solicitation or distribution was or would be harmful."[54] The Court concluded that

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[47] *Id.* at 500.

[48] *Id.* at 501.

[49] *Id.* at 505.

[50] *Id.* at 496. The Court rejected the Hospital's interpretation of the legislative history,

> We can only infer therefore, that Congress was satisfied to rely on the Board to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers.
>
> Second, nothing in the legislative history supports petitioners argument that the particular approach to enforcement of § 7 rights in the Hospital context adopted by the Board is inconsistant with congressional policy.

Id. at 497.

[51] *Id.* at 500. The Court generally defers to the Board's decision recognizing that the Board has developed a special expertise in labor-management disputes. Board rules are judicially reviewable for consistency with the act, and for rationality, but subject to that limited review the Board's application of its rules will be enforced if it is supported by substantial evidence on the record as a whole. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 235-36 (1963).

[52] The Hospital presented a three-step argument to demonstrate that the Court should not apply limited judicial review to the Board's decision: (1) restrictions on solicitation and distribution in areas where patients have access is a medical decision; (2) the Board has no expertise in medical decisions; (3) therefore the Court should not defer to the Board's expertise by limiting review of the Board's decision to whether it was supported by substantial evidence on the record as a whole. 437 U.S. at 500-01.

[53] *Id.* at 501.

[54] *Id.* at 502. The Administrative Law Judge stated, "I am not persuaded that the [Hospital] has offered any convincing evidence to demonstrate that the rule is

the inference drawn by the Board, from the evidence, regarding the likelihood of disruption of patient care was rational.[55] The Court finally found only superficial appeal in the Hospital's fourth argument that the hospital cafeteria could not rationally be distinguished from a public restaurant or retail market.[56] The Court noted that retail markets and restaurants have non-public areas where employees gather, and where employee organizational activity must be allowed.[57] In public restaurants and retail markets, employees may be prohibited from organizational activity where the primary purpose of the business is being performed. In hospitals, the primary function of medical care is performed in the operating rooms, patients' rooms and patients' lounges—not in the cafeteria.[58]

In summary, the Court rejected the Hospital's argument that, with the 1974 Health Care Amendments to the NLRA, Congress intended the Board to develop different rules for employee solicitation and distribution in hospitals.[59] The Court affirmed the Board's use of the presumption of illegality for restrictions on solicitation and distribution on non-working time in non-working areas.[60] Nevertheless, the Court concluded on a cautionary note remarking that the Board's decisions on employee solicitation in hospitals were in flux, and that the Board always could modify its construction of the Act in light of further experience.[61]

Both Justices Blackmun[62] and Powell[63] wrote concurring opinions in which they emphasized the cautionary note of the majority opinion. The concurring opinions supported the conclusion that Beth Israel violated section 8(a)(1) and (3) by implementing and enforcing the restrictions on employee solicitation and distribution. In his opinion, however, Justice Blackmun urged the Board to accept the suggestion of the Court by modifying the rules for organizational activity in hospitals to give greater weight to the hospital's interest in maintaining a "restful, uncluttered, relaxing, and helpful atmos-

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needed, either by reason of actual or suspected interference with patients, visitors, or non-employees." 223 N.L.R.B. at 1198, 92 L.R.R.M. at 1078.

[55] 437 U.S. at 504. The Court left open the possibility that the Hospital might be able to justify a less restrictive rule for regulating solicitation and distribution. *Id.* at 503. The Court also indicated that in future cases the Board might develop a "more finely calibrated scale" to balance the Hospital's interest in protecting patients from disturbance and the employees' organizational rights. *Id.* at 505.

[56] *Id.* at 505-06. The Board has held that a rule prohibiting solicitation and distribution in areas of public restaurants and retail markets which are open to the public does not violate §.8(a)(1) since solicitation tends to upset patrons. *See, e.g.*, Marriott Corp. (Children's Inn), 223 N.L.R.B. 978, 978, 92 L.R.R.M. 1028, 1028 (1976); Bankers Club, Inc., 218 N.L.R.B. 22, 27, 89 L.R.R.M. 1812 (1975); McDonald's Corp. 205 N.L.R.B. 404, 407-08, 84 L.R.R.M. 1316 (1973); Marshal Field & Co. 98 N.L.R.B. 88, 90, 29 L.R.R.M. 1305, 1306 (1952), *enforced*, 200 F.2d 375, 382-83, 31 L.R.R.M. 2073, 2079 (7th Cir.1953).

[57] 437 U.S. at 506.

[58] *Id.*

[59] *Id.* at 507.

[60] *Id.*

[61] *Id.* at 508.

[62] *Id.* Justice Blackmun was joined by the Chief Justice and Justice Rehnquist.

[63] *Id.* at 509. Justice Powell was joined by the Chief Justice and Justice Rehnquist.

phere."[64] Justice Powell in his concurring opinion agreed with the conclusion of the majority that Beth Israel had violated section 8(a)(1) and (3), but rejected the majority's rationale for reaching that conclusion.[65] Justice Powell would not transfer the *Republic Aviation* presumption of the illegality of restrictions on employee solicitation during working time and in non-working areas to hospital situations. Rather, he would base the Court's decision on a finding that the evidence on the record demonstrated section 8(a)(1) and (3) violations.[66]

For Justice Powell, the Hospital's fourth argument—that the Hospital cafeteria cannot rationally be distinguished from a public restaurant—was most persuasive.[67] The presence of patients and visitors, Justice Powell maintained, removes the hospital cafeteria from the industrial and manufacturing model, so that the *Republic Aviation* presumption is inapplicable.[68] Rejecting the presumption approach, Justice Powell would require the Board to show by substantial evidence, on the record as a whole, that the employer has violated sections 8(a)(1) and (3).[69]

The significance of *Beth Israel* is reflected in the disagreement between the majority opinion and Justice Powell's concurrence. The *Republic Aviation* presumption approach adopted by the Court—a presumption that restrictions on employee solicitation and distribution on non-working time and in non-working areas violates section 8(a)(1)—is broader than the standard advocated by Justice Powell. Under the Court's presumption approach, employee organizational activity will be allowed in situations where the union might not be able to meet Justice Powell's substantial evidence standard; unions will win more cases under the presumption approach.

The broad impact of the *Beth Israel* Court's presumption approach is illustrated by another *Survey* year decision, *NLRB v. National Jewish Hospital*.[70] *National Jewish Hospital* involved a hospital rule restricting employee solicitation and distribution which was similar to the rule found to be a section 8(a)(1) violation in *Beth Israel*.[71] The Board found a section 8(a)(1) violation and ordered the National Jewish Hospital to rescind its restrictions on solicitation and distribution.[72] The Tenth Circuit accepted the presumption approach

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[64] *Id.* at 509. Justice Blackmun agreed with Justice Powell that the *Republic Aviation* presumption approach was unnecessary, and of questionable validity when applied to hospitals. Justice Blackmun was concerned that the situation at Beth Israel, which he considered to be unusual, would set a rule for all subsequent hospital solicitation cases where the patient interest might be stronger. *Id.*

[65] *Id.* at 509-10.

[66] *Id.* at 510. Beth Israel's restrictions on employee activity were, for Justice Powell, a clear violation of § 7. The presumption approach was a stronger rule than necessary with which to decide the case.

[67] *Id.* at 513.

[68] *Id.*

[69] *Id.* at 515.

[70] 593 F.2d 911, 99 L.R.R.M. 3141 (1978), *enforcing*, 226 N.L.R.B. 1241, 94 L.R.R.M. 110 (1976).

[71] 593 F.2d at 912, 99 L.R.R.M. at 3142. The rule stated: "Solicitation, collections and petitions for outside agencies are permitted only on approval of the administrator." *Id.*

[72] 226 N.L.R.B. at 1241, 94 L.R.R.M. at 1111.

and enforced the Board's order noting that *Beth Israel* was "not only applicable but controlling; that it comes to grips with our problem and resolves it."[73]

The facts in *National Jewish Hospital* were not, however, exactly similar to those in *Beth Israel*.[74] Ninety to ninety-five percent of the patients at the National Jewish Hospital were ambulatory and ate their meals in the cafeteria.[75] The patients were mostly asthmatic and were highly affected by emotional stress.[76] The employees at the National Jewish Hospital had access to four lounges and two locker rooms where solicitation was permitted.[77]

Under the standard advocated by Justice Powell in his concurring opinion, the Board might not be able to show by substantial evidence that the National Jewish Hospital violated section 8(a)(1). The Board would be required to prove that the Hospital interfered with, restrained, or coerced employees in the exercise of their section 7 rights. The effect of *Beth Israel*, however, is to shift the burden to the Hospital; the Hospital must produce evidence showing that the employees' organizational efforts had a disruptive effect on health care operations.[78] Neither Beth Israel nor the National Jewish Hospital were able to meet this burden. It is probable that many other hospitals also will be unable to show that restrictions on employee organizational activity are necessary to avoid a disruption of health care operations.

The narrow holding of *Beth Israel* is to allow employee solicitation and distribution in a hospital cafeteria where only 1.5% of the patrons are patients. The broader impact of *Beth Israel* will be to protect nearly all employee solicitation and distribution in non-patient care areas.

2. *Extrinsic Evidence in Certification Proceedings:* Bell & Howell

In 1977, the NLRB (Board) reversed its long-standing policy and decided that it would no longer consider extrinsic evidence of a union's discriminatory practices in determining whether to certify a fairly elected bargaining representative.[1] During the *Survey* year, the Court of Appeals for the District

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[73] 593 F.2d at 916, 99 L.R.R.M. at 3145.

[74] Judge Stanley, dissenting in *National Jewish Hospital*, distinguished the cases on their facts. *Id.* at 916-17, 99 L.R.R.M. at 3145-46.

[75] *Id.* at 917, 99 L.R.R.M. at 3145-46.

[76] *Id.* 99 L.R.R.M. at 3146.

[77] *Id.*

[78] *Id.* at 915, 99 L.R.R.M. at 3144. The Tenth Circuit in *National Jewish Hospital* based its shifting of the burden of proof to the Hospital on *Beth Israel:*

"[W]e must be mindful that the Supreme Court in *Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patient's health." *Id. See* Beth Israel, 437 U.S. at 507.

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[1] *Compare* Bell & Howell Co., 213 N.L.R.B. 407, 87 L.R.R.M. 1172 (1974) *with* Bell & Howell Co., 230 N.L.R.B. 420, 95 L.R.R.M. 1333 (1977), *enf'd sub nom.* Bell & Howell Co. v. NLRB, 598 F.2d 136, 100 L.R.R.M. 2192 (D.C. Cir. 1979). *See also* Handy Andy, Inc., 228 N.L.R.B. 447, 94 L.R.R.M. 1554 (1977) (refusing to consider extrinsic evidence of union's discriminatory practices in deciding whether to certify the union as a bargaining representative).

of Columbia enforced the Board's order in *Bell & Howell v. NLRB*,[2] upholding the Board's new policy. The decision of the District of Columbia Circuit is in conflict with the position of the Eighth Circuit.[3] The conflict between the circuits may necessitate eventual resolution by the Surpeme Court unless the persuasive reasoning of the District of Columbia Circuit gains broad acceptance.[4]

The *Bell & Howell* dispute arose when Local 399 of the International Union of Operating Engineers, AFL-CIO (union) petitioned the NLRB for a representation election. After some procedural wrangling,[5] the election was held and the union prevailed. Bell & Howell (company) then moved to disqualify the union because of alleged union discrimination against women.[6]

While Bell & Howell's motion was pending, a plurality of the Board in *Bekins Moving & Storage Co.*,[7] decided that the Constitution prohibited the certification of a union engaged in invidious racial discrimination. Member Kennedy provided the deciding vote by concurring in the result,[8] but declared that his holding was limited to cases involving suspect classifications.[9] When the Board considered the sex discrimination issue in *Bell & Howell*[10] it held that section 9(c)(1) of the National Labor Relations Act[11] mandated certification of a union that was victorious in a fair election. The Board further held that constitutional due process concerns[12] remained dormant unless the

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[2] 598 F.2d 136, 100 L.R.R.M. 2192 (D.C. Cir. 1979).

[3] *See* NLRB v. Mansion House Center Management Corp. 473 F.2d 471, 82 L.R.R.M. 2608 (8th Cir. 1973), where a contrary result was achieved on substantially similar facts. The Court of Appeals for the District of Columbia, in deciding *Bell & Howell*, acknowledged the conflict, but stated that it was "compelled to disagree with that conclusion." 598 F.2d at 139 n.1, 100 L.R.R.M. at 2193-94 n.1.

[4] Of course, not every conflict between the circuits requires the Supreme Court's intervention. The *Bell & Howell* opinion is well-reasoned and may become an important beacon for future decisions in this area.

[5] This wrangling involved Bell & Howell's claim that Local 399 was an inappropriate bargaining unit under the standards enunciated in Mallinckrodt Chemical Works, 162 N.L.R.B. 387, 397, 64 L.R.R.M. 1011, 1016 (1966). However, the *Bell & Howell* court stated that those factors are more relevant to "carve out" elections where a union seeks to sever itself from a larger bargaining representative's membership. 598 F.2d at 141 n.3, 150, 100 L.R.R.M. at 2194 n.3, 2201-02. This part of the case presented no difficulty for the court and, since it is not part of the major holding of the case, it will not be considered in the *Survey*.

[6] 598 F.2d at 141, 100 L.R.R.M. at 2195. The basis for these allegations is discussed in the text at note 33 *infra*.

[7] 211 N.L.R.B. 138, 86 L.R.R.M. 1323 (1974).

[8] Chairman Miller and Member Jenkins formed the plurality in deciding that the Board could not constitutionally certify a union engaged in invidious discrimination. 211 N.L.R.B. at 139, 86 L.R.R.M. at 1325. Members Fanning and Penello took the opposite view and dissented. Member Kennedy, concurring in the result, cast the deciding vote.

[9] Specifically, Member Kennedy mentioned membership policies based on race, alienage or national origin. *See* Bekins Moving & Storage Co., 211 N.L.R.B. at 145.

[10] 213 N.L.R.B. 407, 87 L.R.R.M. 1172 (1974).

[11] 29 U.S.C. § 159(c)(1) (1976).

[12] The due process clause of the fifth amendment prohibits invidious discrimination by the Federal government. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

alleged discrimination precipitated a representation hearing.[13] Member Kennedy, again concurring, reconciled his position in *Bell & Howell* with that in *Bekins* by noting that this *Bekins* principle did not apply to cases involving the non-suspect classification of sex discrimination.[14]

Bell & Howell refused to bargain with Local 399 in order to gain access to judicial review.[15] The NLRB found that Bell & Howell had violated sections 8(a)(1) and 5(a) of the Act.[16] The Board then granted a rehearing, *sua sponte*, to review its finding against Bell & Howell.[17] Before the rehearing was convened, however, the Board decided a third case, *Handy Andy, Inc.*[18] In *Handy Andy*, the NLRB held that the Constitution did not require consideration of *racial* discrimination before union certification, and that section 9 of the Act precluded denials of certification on that basis. The Board thus expressly overruled its *Bekins* decision,[19] and, when *Bell & Howell* was reheard, found that *Handy Andy* controlled and affirmed its finding that Bell & Howell had committed unfair labor practices.[20]

In affirming the NLRB's decision, the court of appeals confronted three major issues: (1) whether Bell & Howell, as an employer, had standing to challenge the union certification by allegations of discriminatory union practices; (2) whether the NLRA bars precertification consideration of the union's record of alleged discrimination; and (3) whether the NLRB violated the due process clause of the fifth amendment of the Constitution by certifying a union without inquiry into alleged discrimination.

In considering the first issue, the court had little trouble finding that the employer had third-party standing.[21] The court found that freedom from bargaining with a discriminatory union is a legitimate interest which the employer is in the best position to protect. A contrary finding, the court noted, might shield the Board's certification from judicial review since no other party at this early stage, including employees, has the adversarial interest necessary to insure standing.[22] An aggrieved employee has an interest

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[13] Bell & Howell Co., 230 N.L.R.B. at 423, 95 L.R.R.M. 1336 (1974).

[14] *Id.*

[15] 598 F.2d at 142, 100 L.R.R.M. at 2195 (1979).

[16] *Id. See* 29 U.S.C. §§ 158(a)(1), (a)(5) (1976).

[17] 239 N.L.R.B. 420, 95 L.R.R.M. 1333 (1977).

[18] 228 N.L.R.B. 447, 94 L.R.R.M. 1554 (1977).

[19] 230 N.L.R.B. at 920, 95 L.R.R.M. at 1334 (1977).

[20] *Id.*

[21] 598 F.2d at 142-44, 100 L.R.R.M. at 2195-97. For a further discussion of third-party standing, *see* Craig v. Boren, 429 U.S.190, 192-97 (1976).

[22] The *Bell & Howell* court stated:

> Whether in this case the interest would otherwise go unprotected depends on precisely how the "interest" at stake is defined. . . . If, on the other hand, the interest is in preventing certification of a discriminatory union, there may be no adequate alternative to allowing the employer to raise the issue. The right of a dissenting unit member, or an individual outside the unit, to intervene in a representation proceeding in order to raise the discrimination issue is questionable.

598 F.2d at 144, 100 L.R.R.M. at 2197.

in fair representation but not necessarily in certification.[23] The court, therefore, avoided the undesirable loss of judicial review of the certification process and recognized employer standing.

The court then turned its attention to the second issue, the relationship of section 9(c)(1) of the NLRA to the dispute. Section 9(c)(1) provides that: "If the Board finds a question of certification exists, it *shall* direct an election by secret ballot and *shall* certify the results thereof."[24] In spite of the mandatory language of this section, it is well settled that the Board may withhold certification to protect the policies of the NLRA from serious erosion.[25] For instance, the Board may deny certification where the election process itself is tainted,[26] or where the union's interests baldly conflict with those of the employees it wishes to represent.[27] The *Bell & Howell* court, therefore, had to choose between labor-related interests—such as the sanctity and efficiency of elections to expedite collective bargaining—and the policy interest of not certifying a union engaged in invidious discrimination.

The court determined that the extent of the NLRB's role in carrying out the national policy against invidious discrimination ought to be determined in light of the purpose underlying the agency's creation.[28] The court noted that the NLRB was a remedial agency[29] concerned primarily with labor/management relations so as to prevent economic disruption. The Act therefore, compels agency action where a union practices discrimination and is unable to represent its employees fairly. Unfair representation threatens critical NLRA concerns because the Act's basic premise is that economic warfare can be minimized by faithful representation and negotiation with management. In this case, an argument that the union had misrepresented its employees would be totally speculative since representation does not begin until after certification. Thus, the court agreed with the Board's decision to reserve consideration of discrimination charges until after a fair representation hearing when actual labor interests are implicated.

Significantly, the court declined to favor protection from speculative discriminatory practices over the obvious potential for disturbing the orderly certification process set forth in section 9 of the Act.[30] The court perceived that complicating the certification process would not necessarily deter discrimination effectively. In favoring labor interests, the court took comfort in the existence of the EEOC which has the tools, expertise, and duty to investigate and correct subtle forms of discrimination. The NLRB, on the other

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[23] The *Bell & Howell* court noted that the Board has procedures for allowing an employee to bring an unfair representation charge against his union after certification. 598 F.2d at 144 n.18, 100 L.R.R.M. at 2197 n.18.

[24] 29 U.S.C. § 159(c)(1) (1976) (emphasis added).

[25] Bell & Howell Co. v. NLRB, 598 F.2d at 146, 100 L.R.R.M. at 2198.

[26] Great Atlantic & Pacific Tea Co., 101 N.L.R.B. 1118, 1120, 31 L.R.R.M. 1189, 1191 (1952).

[27] R & M Kaufman v. NLRB, 471 F.2d 301, 81 L.R.R.M. 2309 (7th Cir. 1972).

[28] 598 F.2d at 147, 100 L.R.R.M. at 2198.

[29] *Id.* at 147 n.36, 100 L.R.R.M. at 2199 n.36.

[30] 29 U.S.C. § 159(c)(1) (1976).

hand, was not designed to prevent discrimination and could only employ the draconian remedy of withholding certification. Furthermore, duplication of the EEOC's efforts would serve no useful purpose.[31]

On the other hand, the court suggested that more blatant discrimination might require an immediate response from the Board, even before certification.[32] This caveat was raised by the third issue the court addressed: the due process clause of the fifth amendment might be violated by a government agency granting its imprimatur of approval to a blatantly discriminatory union. In the instant case, however, Bell & Howell's allegations of discrimination bordered on the frivolous.[33] Specifically, Bell & Howell complained that sections of Local 399's governing instruments called for benefits to "dependent wives" but not to "female employees," and for death benefits to "widows" but not to "widowers."[34] The court decided that such allegations, even if true, were too insignificant and speculative to constitute state action and to implicate the due process clause. The court reasoned that mere certification does not "significantly involve"[35] the government in discriminatory practice. Instead, certification marks the beginning of the union's obligation to refrain from future discriminatory practices.[36] The Constitution, therefore, did not require the court to modify its interpretation of section 9(c)(1) of the Act.[37]

The court's decision thus begins to demarcate the jurisdictional territory between the NLRB and the EEOC. Subtle forms of discrimination, like those alleged in the instant case, are better left to the EEOC.[38] Where the discrimination is so blatant[39] that certification "substantially involves" the state in its perpetuation, however, it may be possible to compel the NLRB's immediate action.[40] For instance, the court suggests that if the union's by-laws exclude women or provide evidence that discrimination is one of the union's purposes, a different result might be reached.[41] The court does not state whether consideration of the discrimination at that point would be mandated by the fifth amendment or whether it would be a matter open to the Board's discretion. Theoretically, it would seem that the Board should have more discretion to avoid the consideration provided it was deciding which forms of discrimination were so threatening to the NLRA that they required precertification action, and which forms were so subtle that the EEOC would be the more appropriate agency to take action.[42] Where the Board runs into

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[31] 598 F.2d at 147-48, 100 L.R.R.M. at 2199-200.

[32] 598 F.2d at 150 & n.46, 100 L.R.R.M. at 2201 & n.46.

[33] *See id.*

[34] *Id.*

[35] *Id.* at 149, 150, 100 L.R.R.M. at 2200.

[36] *Id.*

[37] *Id.* at 150, 100 L.R.R.M. at 2201.

[38] *Id.* at 147-48, 100 L.R.R.M. at 2199-200.

[39] By "blatant" it is meant that the discrimination is so obvious or purposeful that the Board could be said to be "authorizing" or "encouraging" the discrimination by certifying the union. *See id.* at 149, 100 L.R.R.M. at 2200.

[40] *Id.*

[41] *Id.* at 150 n.46, 100 L.R.R.M. at 2201 n.46.

[42] *See* Administrative Procedure Act, 5 U.S.C. § 706 (2)(A) (1976). The A.P.A. provides that an agency's interpretation of law within its aegis should not be upset unless "arbitrary or capricious" or "not in accordance with law." *Id.*

constitutional concerns, however, discretion may be more limited and the Board may be required to deal with it.

Although the court did not establish guidelines it would seem that understanding which allegations of discrimination the Board may be compelled to consider can be clarified by considering the purpose of section 9 of the NLRA in light of the due process clause. Where the NLRB recognized unions that are "discriminatory on their face,"[43] such as a union pledged to exclude women, not only is there state action but no labor purposes are forwarded by the union certification. In fact, by certifying a blatantly discriminatory union, the Board probably would be exacerbating labor/management relations by giving a blatant discriminator official status. In such cases, therefore, the Board may have no choice but to hear the allegations since a *prima facie* due process violation requires immediate consideration and section 9 concerns do not justify postponing a hearing of these charges. Employing this approach, the NLRB can focus on the labor-related effects of a given certification and be fairly certain that its labor perspective will correlate with its constitutional obligations.

In practical terms, the court's decision will deter employers from attempting to forestall a union's certification by alleging that the union practices discrimination. In some cases, this deterrence may allow discriminatory unions to avoid detection until they are already established as bargaining representatives. While it may be true that a discriminatory union, once certified, is more difficult to reform than if it never were recognized, aggrieved employees are in a better position to enlist the NLRB's aid than are employers who may be interested primarily in impeding unionization. *Bell & Howell*, therefore, is in accord with the realities of labor/management relations. Furthermore, the decision tends to harmonize section 9 with the due process clause in accommodating labor-related interests with the national policy against discrimination.

In summary, the Court of Appeals for the District of Columbia Circuit in *Bell & Howell v. NLRB* upheld the Board's certification of a collective bargaining agent which was allegedly discriminating against women. The appeals court enforced the Board's finding that the company violated sections 8(a)(3) and (a)(5) by refusing to bargain with the certified representative. The decision largely takes the Board out of the business of policing potential bargaining representatives for discriminatory practices; that function is properly reserved for the EEOC. However, where the discriminatory policies of the bargaining representative are so blatantly invidious as to interfere with the union's ability to fairly represent the employees, the Board will conduct a hearing and conceivably deny certification. The immediate impact of *Bell & Howell* will be to prevent employers from alleging discriminatory practices by the newly elected bargaining representative as a tactic for stalling negotiations. Hopefully, the well-reasoned opinion of the District of Columbia Circuit will be followed by the other circuits.

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[43] By "discriminatory on its face" reference is made to "blatant" discrimination. See note 39 *supra*.

B. *Bargaining Units*

1. *Withdrawal of Multi-Employer Units Upon Impasse:* Independent Ass'n of Steel Fabricators

The use of multi-employer bargaining units has long been considered a desirable means of promoting effective collective bargaining, and therefore a valuable means of preserving industrial peace.[1] Because of this recognition that the multi-employer bargaining unit is an important component of national labor policy, the National Labor Relations Board (Board) has acted carefully in setting guidelines pertaining to either union or employer withdrawal from such bargaining arrangements.[2] Essentially, the Board has held that prior to opening negotiations, the union or an employer may withdraw unilaterally from group bargaining for any reason, without consent from the other party(ies), provided that adequate and unequivocal notice is given.[3] After negotiations have begun, however, withdrawal is permitted only upon either the mutual consent of the union and employer, or unilaterally in the event of "unusual circumstances."[4] Since these guidelines are designed to promote certainty in the scope of collective bargaining units and to foster and maintain stability in bargaining relationships, the Board has restricted the scope of the "unusual circumstances" justification for withdrawal. Generally speaking, the Board will allow withdrawal only where "the very existence of [the withdrawing employer] as a viable business entity has ceased or is about to cease,"[5] or where the bargaining unit has been fragmented or dissipated to the point that it no longer is viable.[6]

During this *Survey* year, the Second Circuit, in *NLRB v. Independent Association of Steel Fabricators, Inc.*[7] expanded the scope of the "unusual circumstances" rule to include a genuine impasse in contract negotiations. The court determined that an employer may withdraw from contract negotiations upon genuine impasse, provided that unequivocal notice of withdrawal is given to the union.[8] The court also held that an employer has a duty to bargain individually with the union following withdrawal if the union expresses its willingness to bargain.[9]

The *Steel Fabricators* case involved a multi-employer bargaining group (the Association) that had been formed in 1975 by a group of employers who

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[1] NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 95 (1957) (Buffalo Linen Supply Co.).

[2] Retail Associates, Inc., 120 N.L.R.B. 388, 393-95, 41 L.R.R.M. 1502, 1502 (1958).

[3] *Id.*

[4] *Id.*

[5] Hi-Way Billboards, 206 N.L.R.B. 22, 23, 84 L.R.R.M. 1161, 1162 (1973). *See also* Spun-Jee Corporation, 171 N.L.R.B. 557, 558, 68 L.R.R.M. 1121, 1123 (1968).

[6] Typographic Service Co., 238 N.L.R.B. No. 211, 99 L.R.R.M. 1649, 1650 (1978); Connell Typesetting Co., 212 N.L.R.B. 918, 921, 87 L.R.R.M. 1001, 1004 (1974).

[7] 582 F.2d 135, 98 L.R.R.M. 3150 (2d Cir. 1978).

[8] *Id.* at 146, 98 L.R.R.M. at 3157.

[9] *Id.* at 150-51, 98 L.R.R.M. at 3160-61.

previously had bargained individually with Local 455.[10] By combining their bargaining efforts, the group hoped to eliminate some of the fifty-six differences that existed between their expiring individual contracts and the contract received by a different multi-employer group of competitors (Allied).[11] However, bargaining progress was slow. Throughout negotiations, the union persisted in refusing to budge on the Association's attempts to reach parity with the Allied agreement. After six months of bargaining, four members of the twenty-eight member employer unit had withdrawn with union consent.[12] Six others had withdrawn silently and had signed contracts with a different union, Local 810.[13] Finally, nineteen members of the employer group, including the six who already had signed with Local 810, sent written notice of withdrawal to the union.[14] The union promptly replied that it did not consent to the withdrawals, and, within a week thereafter, the union reached a settlement with the five remaining employers.[15] All but two of the nineteen employers who had withdrawn without union consent refused to join in this agreement; six of these nonsignatories eventually signed contracts with Local 810.[16]

Local 455 filed various unfair labor practice charges with the Board.[17] Concerning the charges related to withdrawals from the multi-employer bargaining group, the Board held that all withdrawals made without union consent were invalid.[18] All withdrawing employers were charged by the Board with violations of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. They were ordered to dissolve whatever relationships had been reached with Local 810 and to execute the agreement reached with the five nonwithdrawing employers.[19]

On appeal, the Second Circuit denied enforcement of part of the Board's order.[20] Most importantly, the court found that an impasse in the negotiations had been reached by the time the nineteen members of the employer

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[10] *Id.* at 140, 98 L.R.R.M. at 3152. Local 455 represented, among others, employees in the steel fabrication and construction industry.

[11] *Id.*

[12] *Id.* at 141, 98 L.R.R.M. at 3153.

[13] *Id.*

[14] *Id.* at 141, 98 L.R.R.M. at 3154.

[15] *Id.* at 142, 98 L.R.R.M. at 3154.

[16] *Id.*

[17] Certain employers were charged with violations of sections 8(a)(1), (2), and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (2), (5) (1976), for soliciting their employees to abandon Local 455 and join Local 810. Some were also charged with violations of section 8(a)(1) for threatening plant shutdowns or employee discharge unless workers agreed to join Local 810. Finally, some employers were charged with violatons of sections 8(a)(1) and (3) for failure to reinstate discharge employees upon their unconditional offer to return to work. 231 N.L.R.B. 264, 265, 97 L.R.R.M. 1391, 1392 (1977). Discussion of these issues is beyond the scope of this Survey chapter.

[18] 231 N.L.R.B. at 290, 97 L.R.R.M. at 1392.

[19] *Id.*

[20] *See* NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 153, 98 L.R.R.M. 3150, 3162-63.

unit notified the union of their withdrawal.[21] Reasoning that "the objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework,"[22] the court found that such an impasse was the sort of unusual circumstance which would justify unilateral withdrawal, provided notice was given to the union.[23] Based on this finding, the court held that the withdrawal from multi-employer bargaining was effective as to thirteen of the nineteen withdrawing employers.[24] The six employers who had signed contracts with Local 810 prior to their notice of withdrawal, however, were found to have committed a section 8(a)(5) violation.[25] Since these employers had precluded themselves from bargaining with Local 455 before the Union had been given notice of withdrawal, the court determined that joining in a subsequent notice to the union could not protect them from liability for the earlier inability to bargain.[26]

The court then considered two remaining issues. First, the court denied enforcement to that part of the Board's order which determined that the withdrawn employers were bound by the terms of the agreement reached by the union with the five non-withdrawing members of the Association.[27] Those

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[21] *Id.* at 146, 98 L.R.R.M. at 3157. Although the factors which can lead to a court's finding of impasse are too varied too allow a listing of specific criteria, the Second Circuit cited *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628, 67 L.R.R.M. 3032, 3035-36 (D.C. Cir. 1968), and *NLRB v. Hi-Way Billboards*, 473 F.2d 649, 655, 82 L.R.R.M. 2527, 2532 (5th Cir. 1973), for the proposition that a genuine impasse exists when "there [is] no realistic prospect (sic) that continuation of discussion . . . would have been fruitful." 582 F.2d at 147, 98 L.R.R.M. at 3158. Using this definition, the *Steel Fabricators* court found that an impasse had been reached. The court stated that: "[w]hen the union refused to budge on any of the fifty-odd differences between the independent contracts and the Allied contract, it was akin to affirmation that the Association was useless as a bargaining device." *Id.*, 98 L.R.R.M. at 3157. The court rejected the union's contention that it had broken any impasses by continually circulating new and revised proposals. *Id.*, 98 L.R.R.M. at 3157. The court rejected the union's contention that it had broken any impasses by continually circulating new and revised proposals. *Id.*, 98 L.R.R.M. at 3158. The court noted that "not every shift in position signifies progress, especially if it is unresponsive to the principal issue in contention." *Id.* Since the elimination of disparities between the individual contracts and the Allied agreement was the "single most important issue in dispute," the union's lack of flexibility in that area resulted in a genuine impasse. *Id.*

[22] *Id.* at 146, 98 L.R.R.M. at 3157.

[23] *Id.* at 149, 98 L.R.R.M. at 3159.

[24] *Id.* at 148-49, 98 L.R.R.M. at 3159.

[25] *Id.* at 149, 98 L.R.R.M. at 3159.

[26] The court's requirement of notice of withdrawal is consistent with the position taken by the Board. *See, e.g.*, Goodsell & Vocke, Inc., 223 N.L.R.B. 60, 66, 92 L.R.R.M. 1187, 1187 (1976), *enforced*, 559 F.2d 1141, 96 L.R.R.M. 2370 (9th Cir. 1977). The *Steel Fabricators* court spoke of the dangers of withdrawal without notification: "[s]uch tacit withdrawal not only withholds knowledge from the union about the composition of the bargaining unit, but also deprives it of the opportunity either to initiate independent negotiations with the withdrawing party or to file a complaint promptly with the Board. To abrogate the notice requirement when one party leaves multi-employer bargaining in the face of an impasse would interject a further element of uncertainty into a negotiating context already destabilized by withdrawal." 582 F.2d at 149, 98 L.R.R.M. at 3159.

[27] *Id.*

employers who signed the agreement had made it clear that they were not authorized to sign on behalf of anyone but themselves. The court felt that enforcement of the Board order would be tantamount to allowing the Board "to dictate substantive contractual terms to which neither an employer nor its agent had acceded,"[28] a power which is clearly beyond the scope of Board authority.[29] Thus, the court held that the withdrawn employers, including the six who had withdrawn without notice, were not bound by the terms of the agreement.

The court then considered whether there was a duty for the employers to bargain individually with Local 455 after withdrawal.[30] To evaluate this issue, the court divided the members of the Association into three groups: (1) those employers who signed with Local 810 before giving notice of withdrawal; (2) those employers who signed with Local 810 after giving notice of withdrawal; and (3) those employers who gave notice of withdrawal, but did not sign an agreement with any union.[31] As to the first group, the court held that because they signed with Local 810 before giving any notice to Local 455, they clearly had violated section 8(a)(5).[32] The court found that such "tacit withdrawal" must be considered ineffective in order to perserve "stability of labor relations."[33] The subsequent signing of agreements with Local 810, which precluded any future bargaining with Local 455, therefore resulted in an unexcused violation of section 8(a)(5). As to the second and third groups, the court found that the duty to bargain individually with Local 455 depended on two factors.

First, the duty to bargain exists only if the Union enjoys a majority status among employees.[34] Since Local 455 had not been certified by the Board within the year prior to withdrawal, the union was not entitled to a conclusive presumption of majority status.[35] However, since Local 455 had been the recognized bargaining agent of the employees "for many years," and was the "incumbent union," the court held that it was entitled to a rebuttable presumption of a majority status.[36] The court then stated that, "[e]mployers charged with a refusal to bargain could rebut the presumption by introducing evidence that the union did not in fact have majority support when their refusal occurred or that their refusal was founded on a good faith doubt of the union's majority status."[37]

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[28] *Id.*, 98 L.R.R.M. at 3160.

[29] *See, e.g.*, H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970); NLRB v. Insurance Agents' International Union, 361 U.S. 477, 486 (1960).

[30] 582 F.2d at 149, 98 L.R.R.M. at 3159.

[31] *Id.* at 149-50, 98 L.R.R.M. at 3160.

[32] *Id.* at 150, 98 L.R.R.M. at 3160.

[33] *Id.* at 148-49, 98 L.R.R.M. at 3159.

[34] NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 277 (1972).

[35] 582 F.2d at 150, 98 L.R.R.M. at 3160 (citing Brooks v. NLRB, 348 U.S. 96, 104 (1954)).

[36] *Id.*

[37] *Id.*

Before reaching the question of the union's majority status, however, the court felt that a second factor must be considered in assessing the duty to bargain individually after withdrawal. Even though an employer may concede that the union has majority status, there may be no duty to bargain unless the union requests individual negotiations.[38] In the instant case, the union never requested individual meetings, but "chose, instead, to stand upon its position that the withdrawing employers were bound by the stipulation signed by the minority."[39] Thus, for the third class of employers who withdrew and signed with no union, there was no proof of violation of a duty to bargain.[40] The court reasoned that because of the union's steadfast position regarding the binding effect of the agreement ultimately reached, it was impossible to place blame on the employer for any failure to negotiate individual contracts. As to the second group of employers, however, who withdrew and then signed with Local 810, the court found that "since they intended to sign with *some* union, we believe that they were under a duty to seek bargaining with Local 455 on an individual basis before negotiating with Local 810."[41] This duty to seek bargaining exists even in the face of the union's claim that the employer was already bound by the minority agreement.

The court thus distinguished employers in group two from group three employers by placing the burden on the union to show willingness to bargain individually, unless an employer is about to engage in negotiations with another union. In the latter case the burden to show a willingness to pursue individual negotiations shifts to the employer. Since the employers in group two had not sought individual bargaining with Local 455 before negotiating with Local 810, the court affirmed the Board's finding of an 8(a)(5) violation.[42] The court did, of course, leave room for an employer defense, noting that the negotiations with other unions, without an attempt to reach agreement with Local 455, could be excused if the employer could show that the union had in fact lost its majority status or that there was a rational basis for doubting its majority.[43]

The *Steel Fabricators* decision is significant for two reasons. First, the Second Circuit now has joined four other circuits in holding that an impasse in negotiations is sufficiently "unusual circumstance" to justify withdrawal from multi-employer bargaining.[44] This developing trend in the courts is a clear departure from the Board's policy, which consistently has refused to expand the coverage of the "unusual circumstance" rule to an impasse in bargain-

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[38] *Id.* at 150-51, 98 L.R.R.M. at 3160-61.
[39] *Id.* at 150, 98 L.R.R.M. at 3160.
[40] *Id.* at 151, 98 L.R.R.M. at 3161.
[41] *Id.* (emphasis added).
[42] *Id.* at 152, 98 L.R.R.M. at 3161.
[43] *Id.* at 151, 98 L.R.R.M. at 3161.
[44] NLRB v. Beck Engraving Co., 522 F.2d 475, 483, 90 L.R.R.M. 2089, 2094 (3d Cir. 1975); NLRB v. Associated Shower Door Co., 512 F.2d 230, 232, 88 L.R.R.M. 3024, 3025-26 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 183-84, 87 L.R.R.M. 2203, 2205-06 (5th Cir. 1974); Fairmont Foods Co. v. NLRB, 471 F.2d 1170, 1172-73, 82 L.R.R.M. 2017, 2019 (8th Cir. 1972).

ing.[45] The second important aspect of the *Steel Fabricators* case is its holding regarding the employer's duty to bargain with the union following withdrawal from the multi-employer group. The *Steel Fabricators* decision represents the first thorough discussion of the issue in a circuit court.

To evaluate the soundness of the court's decision one must consider the two reasons typically advanced to justify unilateral withdrawal upon impasse. The four circuits which upheld the impasse justification for withdrawal prior to *Steel Fabricators* seemed most concerned with the promotion of even-handed fairness in the union/employer relationship.[46] The courts all noted that the Board has committed itself to the proposition that its rules for withdrawal from multi-employer negotiations should apply equally to unions and employers.[47] Since the Board has held that a union which has commenced collective bargaining with a multi-employer group may withdraw from the group bargaining with respect to one or more employers, while continuing to hold negotiations with the other members as a unit,[48] it would be unfair to deny employers the right to withdraw upon impasse. If, upon impasse, a union is allowed to enter into individual negotiations and reach individual agreements with selected members of the employer unit who then would resume operations, the bargaining strength of the remaining members would be weakened considerably. Through the subsequent use of selected strikes, the union would be able to whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit into signing a collective bargaining agreement that would reflect the union's strengthened bargaining position. This imbalance resulting from the Board's present position is removed by allowing employers, as well as unions, to withdraw from multi-employer bargaining upon impasse.

Although the court in *Steel Fabricators* recognized the importance of balancing union/employer negotiating weapons, and protecting the group members from being whipsawed by selected individualized agreements,[49] the court seemed most concerned with a second reason for permitting withdrawal: the futility of continued group negotiations in the face of a genuine impasse.[50] Since the rules against untimely withdrawal are designed to preserve the stability of multi-employer bargaining, once a genuine impasse is reached there is no utility in narrowly applying these rules to preserve a bargaining situation that obviously has failed. Rather than keep employers locked

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[45] Florida Fire Sprinklers, Inc., 237 N.L.R.B. No. 155, 99 L.R.R.M. 1078, 1078 (1978); Bill Cook Buick, Inc., 224 N.L.R.B. 1094, 1096, 92 L.R.R.M. 1582, 1582 (1976); Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23-24, 84 L.R.R.M. 1161, 1163 (1973).

[46] See note 44, *supra*.

[47] The Evening News Ass'n, 154 N.L.R.B. 1494, 1495-97, 60 L.R.R.M. 1149, 1150-52 (1965), *enforced sub nom.* Detroit Newspaper Publishers Ass'n v. NLRB, 372 F.2d 569, 572, 64 L.R.R.M. 2403, 2406 (6th Cir. 1967).

[48] Pacific Coast Ass'n of Pulp & Paper Manufacturers, 163 N.L.R.B. 892, 895, 64 L.R.R.M. 1420,. 1423 (1967).

[49] 582 F.2d at 147 n.21, 98 L.R.R.M. at 3158 n.21.

[50] See text and notes at notes 21 and 22, *supra*.

into a group position, the court felt that it would better serve the interests of labor policy to allow withdrawal and a fresh start on an individualized basis.

The disagreement between the circuits and the Board over use of the impasse doctrine appears to rest mainly on differences in viewpoint regarding the impact of an impasse on the bargaining situation. The Board has stated that:

> [A] genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Moreover, the occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted. Therefore, it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, a genuine impasse is not the end of collective bargaining.[51]

In denying withdrawal rights upon impasse, the Board plainly is concerned with disruption of the normal processes of bargaining. No doubt, the Board is justified in denying withdrawal where hard bargaining or economic strikes lead to gaps in the negotiating process, but where continued bargaining is reasonably certain to occur. In situations like *Steel Fabricators,* however, where group bargaining has been an obvious failure, or where there is no realistic possibility that continuation of discussion would prove to be fruitful, the decision of the circuits appears to be justified. Whether used to provide equivalence in union/employer bargaining weapons, or to prevent employers from being locked into a useless negotiating situation, the impasse doctrine should be accepted by the Board. The concerns of both the Board and the courts can be met by distinguishing between a halt in bargaining progress that reflects difficulties of sufficient magnitude to justify withdrawal, and a situation where the prospects for future progress appear reasonable.

The Second Circuit has demonstrated this sort of responsible application of the impasse doctrine by denying withdrawal in a decision announced the same day as *Steel Fabricators.* In *NLRB v. Acme Iron Works, Inc.*,[52] an employer (Acme) had attempted unilateral withdrawal from negotiations, and had claimed that a bargaining impasse justified the attempted withdrawal.[53] Although negotiations had come to a halt, the court noted that "[t]he suspension of negotiations does not of itself indicate that further discussion would have been fruitless."[54] The court then referred to the industry practice, whereby Acme's bargaining group (the Association) would use the agreement reached

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[51] Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23, 84 L.R.R.M. 1161, 1162-63 (1974).

[52] 582 F.2d 153, 98 L.R.R.M. 3163 (2d Cir. 1978).

[53] *Id.* at 155-56, 98 L.R.R.M. at 3164-65.

[54] *Id.* at 157, 98 L.R.R.M. at 3165-66.

between the union and another multi-employer group (Allied) as a benchmark.[55] The court felt that negotiations between the union and the Association were simply at a lull while the parties awaited a settlement between the union and Allied. Thus, the court stated that even though bargaining was stopped, "the prospects for a settlement were excellent."[56] Furthermore, the court noted that "[u]nlike *Independent Association of Steel Fabricators,* where both parties displayed intransigence on a critical issue, . . . there is nothing in the record here to suggest that the Union would decline to give [Association] employers the benefit of the Allied agreement, and nothing to indicate that they had reason to hope for something better."[57] The distinction drawn by the Second Circuit between impasse situations where further negotiations would be fruitless (*Steel Fabricators*), and those that arise in the normal course of the bargaining process (*Acme Iron Works*), should be adopted by the Board in analyzing future withdrawal cases.

The second part of the *Steel Fabricators* decision, in which the court discussed the individual bargaining duties of withdrawing employers, also is consistent with national labor policy. The use of collecive bargaining as a means of preserving industrial peace is the crux of that policy.[58] The fact that a voluntarily created multi-employer group has been a failure should not excuse any party from their section 8 duties to bargain in good faith. Furthermore, it appears proper to require the union to show willingness to bargain individually before holding an employer liable for refusal to bargain, unless the employer is considering negotiations with an outside union. In a situation like *Steel Fabricators,* where the union refuses to consent to employer withdrawals and adheres to a position that all employers are bound by any subsequent agreement, it would be futile to place an affirmative duty on employers to press for individualized bargaining.

In sum, both the Board and the courts agree that the use of multi-employee bargaining units is an effective means of promoting collective bargaining. In the interest of preserving stability in the bargaining process, it is essential that rules be fashioned to govern the withdrawal rights of individual employers within the group. In cases where the group bargaining process breaks down, the Second Circuit, in *NLRB v. Independent Ass'n of Steel Fabricators,* has now joined four other circuits in holding that a "genuine impasse" in negotiations is an appropriate event for employer withdrawal from the bargaining group. Employers who withdraw are thereafter required to seek individual negotiations with the union, unless the union refuses to accept the validity of a withdrawal and persists in negotiating solely with the remaining group members. The Second Circuit's decision appears to be a reasonable accommodation of all parties' interests, and should serve to promote labor relations stability in situations where group bargaining has failed.

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[55] *Id.* at 158, 98 L.R.R.M. at 3166.

[56] *Id.* at 157, 98 L.R.R.M. at 3165.

[57] *Id.* at 158, 98 L.R.R.M. at 3166.

[58] *See, e.g.,* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

III. Unfair Labor Practices

A. *Employer Unfair Labor Practices*

1. *Duty to Release Information*

a. *Detroit Edison*—The employer's duty to bargain collectively, established in section 8(a)(5) of the NLRA[1] includes the duty to provide relevant information to the employees' collective bargaining agent.[2] During the *Survey* year in Detroit Edison Co. v. NLRB,[3] the Supreme Court considered the issue of whether an employer is required to provide psychological aptitude tests, and test scores of named employees, which were used as criteria for promotion, to the employee's bargaining agent in preparation for arbitration.[4] The Court held that the Board had exceeded its remedial discretion in ordering the employer to release the tests directly to the union[5] and that the employer had not committed an unfair labor practice by refusing to release the scores of individual employees until the union procured the employee's consent.[6] The decision has the immediate impact of protecting the utilization of standardized aptitude tests in employment situations, and also has a broader impact through its limitation of the employer's duty to provide the union with relevant information and its complication of the arbitration process.

Detroit Edison (Company) is a public utility engaged in the generation and distribution of electric power in Michigan.[7] The Utility Workers Union of America Local 223, AFL-CIO (Union) represents a unit of operating and maintenance employees at the Company's plant in Monroe, Michigan.[8] One of the provisions of the collective bargaining agreement specified that promotions within the unit were to be based on seniority "whenever the reasonable qualifications and abilities of the employees are not significantly different."[9] In 1971 the Company invited bids from unit employees to fill six Instrument Man B openings at the Monroe plant.[10] The Company administered standardized aptitude tests as a means of predicting job performance on the Instrument Man B positions, and all employees who bid for the positions were required to take the aptitude tests.[11] On the basis of the aptitude tests the

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[1] 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) provides in pertinent part—: "[i]t shall be an unfair labor practive for an employer—to refuse to bargain collectively with the representatives of his employees."

[2] NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956).

[3] 440 U.S. 301 (1979). Justice Stewart delivered the opinion of the Court, in which the Chief Justice and Justices Blackmun, Powell, and Rehnquist joined. Justice Stevens concurred in part and dissented in part. Justice White filed a dissenting opinion, in which Justices Brennan and Marshall joined.

[4] *Id.* at 303.

[5] *Id.* at 317.

[6] *Id.* at 320.

[7] *Id.* at 304.

[8] *Id.*

[9] *Id.* at 304-05.

[10] *Id.* at 307. An "Instrument Man B" is responsible for installing, calibrating, testing and adjusting power plant instrumentation. The position is the lowest starting grade under the contract. *Id.* at 305.

[11] *Id.* at 306.

employees were graded either as "not recommended" or as "acceptable".[12]

Ten unit employees bid for the Instrument Man B positions. None of the employees received an "acceptable" score on the aptitude tests; they all were rejected on that basis.[13] The Company eventually filled the jobs with employees from outside the bargaining unit.[14] The Union subsequently filed a grievance concerning the company's refusal to hire any of the ten unit employees, contending that the testing procedure was unfair, and that the Company's bypassing the senior unit employees violated the collective bargaining agreement. The grievance was taken to arbitration.[15]

In preparation for the arbitration, the Union requested that the Company turn over materials relating to the standardized psychological aptitude tests administered for the Instrument Man B position. The Union requested three types of information: the actual tests (the test battery), the applicant's test papers, and the applicants test scores, identified by name.[16] The Company refused to release the materials, claiming that complete confidentiality of the materials was required to protect the future use of the tests and the privacy of the applicants.[17]

The Union filed an unfair labor practice charge with the Board.[18] The Administrative Law Judge agreed with the Union and determined that the Company's failure to turn over the materials was a section 8(a)(5) violation. He ordered that the tests and answer sheets be delivered to "a qualified psychologist selected by the Union to act in its behalf in this matter."[19] The Board affirmed the finding of the violation, but modified the remedial order to require the Company to give the materials directly to the Union.[20] The Court of Appeals for the Sixth Circuit enforced the Board's order;[21] the Supreme Court reversed.[22] The Court held, first, that the Board abused its dis-

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[12] *Id.* The tests were revised in the late 1960's. Originally the company graded employees as "not recommended, acceptable or recommended." *Id.* Under the revised testing system only two grades were possible "not recommended" or "acceptable." The gross test score for the new "acceptable" grade was higher than the old "acceptable" grade but lower than the old "recommended" grade. *Id.*

[13] *Id.* at 307. The employees were graded on a point system. A total score of less than 10.3 indicated that the employee was not recommended, a score above 10.3 was acceptable.

[14] *Id.* at 307.

[15] *Id.*

[16] *Id.* at 307-08.

[17] *Id.* at 308.

[18] *Id.* The parties proceeded with the arbitration with the reservation that the union could reopen the hearing should it prevail on its unfair labor practice charge. The arbitrator found that the Company was within its contractual rights in administering the tests, but that the cutoff point of 10.3 was arbitrary. The arbitrator ordered the Company to reevaluate the three employees who scored between 9.3 and 10.3. One of these employees was eventually hired. *See* Detroit Edison Co., 218 N.L.R.B. 1024, 1029-31, 89 L.R.R.M. 1515 (1975).

[19] 218 N.L.R.B. 1024, 1036, 89 L.R.R.M. 1515, 1519.

[20] *Id.* at 1024, 89 L.R.R.M. at 1519.

[21] NLRB v. Detroit Edison Co., 560 F.2d 722, 727, 95 L.R.R.M. 3341, 3344 (6th Cir. 1977).

[22] 440 U.S. 301, 320 (1979).

cretion in ordering the Company to turn over the test battery and answer sheets directly to the Union.[23] Second, the Court held that the Board's order requiring the Company to release the employee's scores was erroneous, that the Company's refusal to release the scores was not a section 8(a)(5) violation.[24]

The Court accepted the Board's finding that the Company had violated section 8(a)(5) by refusing to release the test battery and answers.[25] While affirming the Board's finding of a statutory violation, however, the Court questioned the Board's remedial order, which required the Company to release the test battery and answers directly to the Union, rather than to a qualified psychologist, as the Adminstrative Law Judge had ordered. The Court found that the Company had an "undisputed and important"[26] interest in keeping the test questions and answers secret, and that the Board's remedial order unnecessarily disserved the "legitimate and substantial" interest of the Company in secrecy.[27] The Court also found that the restrictions contained in the Board's order—that the Union use the tests to the extent necessary to process and arbitrate the grievances, but not to copy or disclose the tests—probably were unenforceable.[28] Due to these considerations the Court concluded that the Board's remedial order exceeded its discretion;[29] the Company should not be required to release the test battery and answers directly to the union.[30]

The Court next analyzed the issue of whether the Company had committed a section 8(a)(5) unfair labor practice by refusing to release the scores of the applicants who took the test and to identify these scores by the employees'

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[23] *Id.* at 317.

[24] *Id.* at 320.

[25] *Id.* at 312. The Company presented the following arguments: (1) disclosure of the test materials to the union includes a substantial risk of disclosure to potential job applicants; (2) the company went to great expense to prepare and validate the tests; (3) the effectiveness of the tests depends on their secrecy; (4) public policy favors validated performance aptitude tests; (5) material harm will result if the company is required to release the tests directly to the Union. *Id.* at 313.

The Board countered with the following arguments: (1) the Union's institutional function of presenting grievances at arbitration requires the information; (2) the Union will not distribute the information, and will respect the Board's order. *Id.* at 314.

[26] *Id.* at 316.

[27] *Id.* at 315.

[28] *Id.* The Court implied that the Union would violate inevitably these restrictions. Further, the Court noted that contempt proceedings would not be available against the Union since the Union was not a party to the appeals court enforcement proceeding. The Court dismissed as inadequate the possibility of unfair labor practice proceedings to enforce the Board's restrictions. *Id.* at 315-16. The dissent rejected this analysis. *Id.* at 322-24.

[29] *Id.* at 316-17.

[30] *Id.* This reversal of the Board's remedial order, while affirming the Board's finding of an 8(a)(5) violation, implicitly re-establishes the remedial order of the Administrative Law Judge which required the Company to release the test battery and answers to a qualified, Union selected psychologist. *See* 218 N.L.R.B. at 1036, 89 L.R.R.M. at 151.

name.[31] The Court determined that the Company had a well founded interest in preserving employee confidence in the testing program[32] and that the Company's promise of confidentiality was not designed to frustrate union attempts to process grievances.[33] The Court then took judicial notice of the fact that people are sensitive to the disclosure of information concerning their basic competency.[34] The Court, with these factors in mind, concluded that the Company's offer to release the examinees' scores only upon consent of the individual examinees satisfied the Company's obligations under section 8(a)(5) to bargain in good faith.[35] The Court, therefore, held that the Board's order requiring the Company to release unconditionally the employees' scores to the Union was erroneous.[36]

In summary, the Court retained the Board's finding that the Company committed a section 8(a)(5) unfair labor practice by refusing to release the tests and answer sheets. The Court, however, rejected the Board's remedial order for that violation, determining that the Board exceeded its discretion in ordering the Company to release the tests and the answers directly to the Union.[37] The Court completely rejected the Board's finding that the Company committed a section 8(a)(5) unfair labor practice by unconditionally refusing to release the examinees' test scores. The Company's offer to release the scores, upon consent of the individual examinees, the Court found, satisfied the Company's duty to bargain in good faith.[38]

Both aspect of the Court's opinion present significant developments in labor law. Generally, once the Board has determined that a party has committed an unfair labor practice, the Board is accorded "broad discretionary" power to remedy the unfair labor practice "subject to limited judicial review."[39] The Court had previously held that the remedial order of the Board "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' "[40] In *Detroit Edison*, however, the Court was willing

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[31] 440 U.S. at 312, 317-20. The Company presented several arguments on this issue: (1) the information is not relevant for the Union's purposes; (2) the Union's need for the individual test scores is outweighed by, (a) the Company's promise of confidentiality; (b) the psychologists code of ethics; (c) the potential embarrassment and harrassment of the examinees. *Id.* at 317.

The Board presented the following arguments: (1) The information is relevant; and (2) The Union's need outweighs the Company's asserted justification for non-release. *Id.*

[32] *Id.* at 315.

[33] *Id.* at 319.

[34] *Id.* at 318. The dissenters disagreed with this point, finding that the potential embarrassment of employees in this situation was speculative and not a subject for judicial notice. *Id.* at 328.

[35] *Id.* at 317.

[36] *Id.* at 320.

[37] *Id.* at 316-17.

[38] *Id.* at 318.

[39] Fibreboard v. NLRB, 379 U.S. 203, 216 (1964). The *Detroit Edison* dissent emphasized the remedial discretion normally accorded to the Board. 440 U.S. at 321.

[40] Fibreboard v. NLRB, 379 U.S. 203, 216 (1964) (quoting Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943)).

to substitute its own accomodation of the conflicting interests in place of the Board's determination.

As the dissent noted, the Court's rejection of the Board's remedial order, is an implicit acceptance of the original order of the Adminstrative Law Judge which required the Company to release the test battery and answers to a psychologist selected by the Union.[41] By tacitly adopting this remedial order, the Court is introducing a third party, or at least an uninvited partner for the union, into the arbitration process. This requirement of employing an expert psychologist, as a prerequisite to obtaining the relevant information from the company, complicates a proceeding which is ideally a model of efficiency, economy and justice.[42] By striking the Board's remedial order, therefore, the Court has both limited the remedial discretion of the Board, and complicated some arbitration proceedings by requiring the involvement of third party experts.

The second part of the Court's holding—that the company's refusal to provide the test scores unless the union procures the employees' consent is not a section 8(a)(5) violation—is the more significant aspect of the opinion. Decisions in the line of *NLRB v. Truitt Mfg. Co.*[43] and *NLRB v. Acme Industrial Co.*,[44] have followed the analysis that once the union shows that the sought after information is relevant, the company is required to release the information.[45] In *Detroit Edison*, the Court rejected that analysis. Although the Court accepted the relevance of the sought after information,[46] the Court rejected the relevancy standard for the release of information. Instead, the Court adopted a standard which balanced the interest of the Company, the employees and the Union in considering the release of the information.[47] This balancing approach is likely to limit the information which employers are required to provide to unions.

The introduction of the employees' interest in confidentiality into the arbitration process is a noteworthy development. Arbitration is a contractual enforcement mechanism, in which the employer and the collective bargaining agent, the parties to the contract, are parties; the individual employee grievant is not a party to the arbitration. The union has a duty to represent fairly all the employees in the bargaining unit,[48] not simply those employees who

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[41] 440 U.S. at 324-25. *See* Detroit Edison Co., 218 N.L.R.B. at 1036, 89 L.R.R.M. at 1519.

[42] "Efficiency, Economy and Justice" is the motto of the American Arbitration Association.

[43] 351 U.S. 149 (1956).

[44] 385 U.S. 432 (1967). In *Acme* the Court found that an employer had a duty to release information when the union demonstrated "a probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Id.* at 437.

[45] *Id.* at 436.

[46] 440 U.S. at 311.

[47] *Id.* at 319.

[48] Steele v. Louisiana & Nashville R. Co., 323 U.S. 192, 199-200 (1944); Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). A union violating its duty of fair representation is liable in federal court for damages or equitable relief. *See* Vaca v. Sipes, 386 U.S. 171, 196 (1967).

consent to have the employer release their scores. The Court's weighing of the employer's, employees' and union's interest in the release of the information creates the possibility of a divergence of interest between the union and some of the employees, a conflict with which the arbitration process was not designed to deal.

In conclusion, the narrow holding of *Detroit Edison* is that the Board exceeded its discretion in ordering the Company to release the test battery and answers directly to the Union, and that the Company did not violate section 8(a)(5) by refusing to turn over the employees' scores until the Union procured the indvidual employees' consent. The broader impact of the case, however, will be to restrict union access to admittedly relevant information and to create in an arbitration proceeding a potential conflict of interest between the collective bargaining agent and the employees it represents.

b. *Westinghouse Electric; East Dayton Tool & Die Co.*—The National Labor Relations Act[1] (the Act) imposes an obligation to "bargain collectively" upon both employers and labor organizations subject to its terms.[2] To fulfill this statutory mandate, and to assure that the bargaining which takes place is informed bargaining, a duty is imposed upon employers to furnish, at the union's request, such information and data as may be needed by the labor organization to negotiate and administer a collective bargaining agreement.[3] The union's right of access to, and the employer's corresponding obligation to disclose, the requested information depends upon the "relevancy" of the information sought to the rights and duties of the labor organization.[4] An employer who fails to produce relevant information or data properly sought by the union commits an unfair labor practice in violation of section 8(a)(5) of the Act.[5] The labor union is also subject to certain obligations under the Act. Among these is the duty of fair representation: an obligation to represent fairly and without discrimination all unit employees with respect to terms and conditions of employment.[6] In two National Labor Relations Board decisions

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[1] 29 U.S.C. § 151 *et seq.* (1976).

[2] *See* 29 U.S.C. §§ 158(a)(5), (b)(3), and (d) (1976).

[3] NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967); NLRB v. Whitin Machine Works, 217 F.2d 593, 594, 35 L.R.R.M. 2215, 2216 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955); Veritrol Division, Boeing Company, 182 N.L.R.B. 421, 421, 74 L.R.R.M. 1165, 1167 (1970).

[4] A broad, discovery-type standard is used in determining the relevance of the information sought by the union. The union must show simply "a probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967).

[5] 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) states that "[i]t shall be an unfair labor practice for an employer—. . . to refuse to bargain collectively with the representatives of his employees . . . ." *Id.*

[6] Steele v. Louisiana & Nashville R. Co., 323 U.S. 192, 199-200 (1944); Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). A union is obligated to represent employees without regard to race, sex, union status or other invidious grounds. A union violating its duty of fair representation may be subject to a federal court suit for damages or equitable relief, Vaca v. Sipes, 386 U.S. 171, 196 (1967), or to decertification or unfair labor practice proceedings before the National Labor Relations Board.

rendered during the *Survey* year, the Board expanded the scope of information possessed by the employer which is available to the union for collective bargaining and contract administration purposes. In *Westinghouse Electric Corp.*[7] the Board held that labor unions were entitled to statistical data—broken down by race, sex and Spanish surname—concerning the composition of the bargaining unit.[8] The Board also held that an employer must provide the union with a compilation of complaints and charges filed against the employer under various federal and state fair employment practices laws,[9] and dismissed as inapplicable statutes guaranteeing the confidentiality of such charges.[10] In a companion case decided the same day, *East Dayton Tool and Die Co.*,[11] the Board further broadened the *Westinghouse* decision by holding that the union was entitled to information relating to the race and sex of job applicants where that information is relevant to the monitoring of a collective bargaining agreement.[12]

Together, *Westinghouse* and *East Dayton* raise the possibility that the union's duty of fair representation has been broadened to a considerable extent. The increased availability of information relating to the racial, sexual and Spanish surname composition of the bargaining unit may impose upon the union a corresponding obligation to seek out, analyze and act upon such information actively in fulfilling its duty to monitor employer compliance with contractual and statutory antidiscrimination provisions. Further, *Westinghouse* and *East Dayton* may have pierced the shield of confidentiality accorded charges and complaints filed against employers pursuant to Title VII of the Civil Rights Act[13] and other federal and state fair employment practices statutes.

A. *Westinghouse Electric*

In *Westinghouse*, the Electrical Workers International Union (IUE), representing certain Westinghouse bargaining units, requested from Westinghouse three categories of information. First, the IUE sought a statitical breakdown—by race, sex and Spanish surname—of Westinghouse's workforce with respect to labor grade, job classification, wage rate, method of payment (daywork or incentive pay basis), seniority, hiring, and promotions.[14] Second, the union requested a compilation of all complaints and charges filed against Westinghouse that alleged violations of federal and state fair employment practices laws.[15] Finally, the union sought copies of Westinghouse's "affirmative action plan" and accompanying "work force

Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.), 147 N.L.R.B. 1573, 1576, 56 L.R.R.M. 1289, 1294 (1964); Galveston Maritime Ass'n., Inc., 148 N.L.R.B. 897, 899, 57 L.R.R.M. 1083, 1085 (1964).

[7] 239 N.L.R.B. No. 19, 99 L.R.R.M. 1482 (1978).

[8] *Id.*, 99 L.R.R.M. at 1487-88.

[9] *Id.*, 99 L.R.R.M. at 1491.

[10] *Id.*

[11] 239 N.L.R.B. No. 20, 99 L.R.R.M. 1499.

[12] *Id.*, 99 L.R.R.M. at 1501.

[13] 42 U.S.C. § 2000e *et seq.* (1976).

[14] 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1485.

[15] *Id.*

analysis."[16] When Westinghouse refused to comply with this request, the IUE filed an unfair labor practice charge with the Board alleging that the employer's failure to provide the requested information violated sections 8(a)(1) and 8(a)(5) of the Act.[17]

The matter was heard first before an Administrative Law Judge (ALJ), who found that Westinghouse had violated the Act by its refusal to comply with certain of the requests for information.[18] The ALJ ordered Westinghouse to produce the statistical information and the information regarding charges and complaints as requested by the union, but only insofar as that information related to employees within the IUE bargaining units.[19] No disclosure was ordered of information relating to non-unit employees. The ALJ also ordered Westinghouse to produce copies of its affirmative action plan and work force analysis.

The Board affirmed the decision and order of the Administrative Law Judge in most respects.[20] The Board addressed, first, the union's request for statistical employment data broken down by race, sex and Spanish surname. Although recognizing that the issue was not seriously contested by Westinghouse,[21] the threshold concern for the Board was whether this statistical information was relevant to the collective bargaining process.[22] The Board concluded that, for a number of reasons, this information did meet the relevancy test. The Board first noted the general non-discrimination policies of the National Labor Relations Act and the appropriateness of non-discrimination as a subject of collective bargaining.[23] Further, the Board noted that the collective bargaining agreement in effect between Westinghouse and the IUE contained an antidiscrimination clause, which could be

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[16] *Id.* Westinghouse, as a United States government contractor, is required by Executive Order No. 11296 to develop and maintain an "affirmative action plan" containing company projections, goals and timetables to achieve equal employment opportunities. 41 C.F.R. § 60—2.10-2.13 (1978). Included in this plan is a "work force analysis," which is a listing by job title, pay and other categories of all employees of the company, broken down by race and sex. 41 C.F.R. § 60—2.11(a) (1978).

[17] 29 U.S.C. §§ 158(a)(1) and (a)(5) (1976).

[18] 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1485.

[19] *Id.*, 99 L.R.R.M. at 1493.

[20] *Id.* The Board's disagreement with the ALJ concerned the ALJ's order that Westinghouse provide the union with its affirmative action plan. See text and notes at notes 33-36 *infra*.

[21] 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1487. The Board noted that counsel for Westinghouse objected only to making the compilation of the data, and not to the legal obligation to supply the data. *Id.*

[22] *Id.*, 99 L.R.R.M. at 1485-87.

[23] *Id.*, 99 L.R.R.M. at 1486. The Supreme Court has stated that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority." Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 66 (1975). Toward this end, it has been held that failure to bargain in good faith concerning discriminatory practices is a violation of section 8(a)(5) of the Act. Farmer's Cooperative Compress, 169 N.L.R.B. 290, 290, 67 L.R.R.M. 1266, 1267 (1968), *enforced sub nom* United Packing Houses, Food and Allied Works Int. v. NLRB, 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

monitored through the use of such data.[24] Finally, the Board interpreted the union's duty to its members—its duty of fair representation—as requiring that the union seek and acquire such information or risk being held in breach of its duty through "passive ignorance" of the employer's discriminatory practices.[25] Based on these factors and concerns, the Board held that the requested statistical data, as it concerned employees in the bargaining unit, was presumptively relevant to the bargaining process.[26] The union, therefore, was not required to make an initial showing of relevance before it became entitled to the information.[27] After finding presumptive relevance, the Board rejected the employer's defenses for its failure to provide the statistical data sought,[28] and affirmed the ALJ's order that Westinghouse produce the data for the union.[29]

Having concluded that the statistical data was relevant to the bargaining process and thus was available to the IUE, the Board next considered the

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[24] 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1486.

[25] *Id.*, 99 L.R.R.M. at 1486-87.

[26] *Id.*, 99 L.R.R.M. at 1487.

[27] *Id.*

[28] *Id.*, 99 L.R.R.M. at 1488-91. Westinghouse raised five "affirmative" defenses to providing the union with the requested data, regardless of its relevance. First, Westinghouse contended that the local union, and not the International IUE, was the proper party to request such information. The Board, pointing out that the antidiscrimination clause between the parties was contained in the *national* contract, quickly rejected this defense. *Id.*, 99 L.R.R.M. at 1488.

Second, Westinghouse argued that the IUE "waived" its right of access to the requested statistical data. The Board concluded that the record did not show evidence of such a waiver. *Id.*

As a third defense, Westinghouse claimed that the IUE was seeking the requested information not for the purposes of collective bargaining, but for the purpose of prosecuting a Title VII suit against the company, and that therefore, Westinghouse should not have to provide the union with the data. The Board disagreed. Information relevant to the collective bargaining process, stated the Board, does not lose that relevance simply because it is susceptible to use by the union in another forum. *Id.*, 99 L.R.R.M. at 1489. In any event, the Board noted further that, Title VII and NLRA forums overlap and the use of any of these forums by a labor union is neither inconsistent nor impermissible as related to the bargaining obligations of the union. *Id.*

Westinghouse further stated, as a fourth defense, that the IUE, in seeking the statistical data, was attempting to circumvent discovery processes under the Federal Rules of Civil Procedure. Rejecting this contention, the Board noted that such data might, in any event, be subject to production under the Federal Rules. The Board found no evidence that the union was either acting in bad faith or attempting to abuse the Board's processes in requesting the information. *Id.*

As a fifth, and final defense, Westinghouse claimed that compiling and providing the union with the requested information would place an undue burden upon the company. The Board rejected this defense as well, declaring that Westinghouse had not made a valid attempt to substantiate this claim and that, regardless, Westinghouse was required, as a government contactor, to keep much of the information sought by the union. See note 15 *supra*. 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1489-90.

[29] *Id.*, 99 L.R.R.M. at 1490. The Board also affirmed the ALJ's holding that the requested statistical data was not presumptively relevant as to non-unit employees, and that the union had not shown the particular relevance required. Therefore, information regarding non-unit employees was not ordered produced. *Id.*, 99 L.R.R.M. at 1487.

union's request for the list of complaints and charges filed against Westinghouse alleging violations of Title VII and of other fair employment practices laws.[30] Unlike the statistical data previously discussed, the Board did not find "plainly obvious" the relevance of these charges and complaints, and therefore invoked no presumption of relevance concerning them.[31] Rather, the Board required the union to specify the relationship between the information sought and the union's bargaining duties.[32] To fulfill this requirement, the IUE offered two justifications for seeking the charges and complaints: first, it contended that the information was necessary so that it could accurately measure employee discontent concerning any alleged discriminatory practices on the part of Westinghouse; and second, the IUE claimed that the information would serve to determine whether charges of discrimination against Westinghouse had been resolved in a manner inconsistent with the collective bargaining agreement.[33] The Board, concluding that these concerns of the union were sufficient to make such information relevant to the union's bargaining duties, affirmed the order of the ALJ requiring Westinghouse to provide the union the information regarding charges and complaints.[34]

In finding the union entitled to these charges and complaints, the Board expressly rejected Westinghouse's contention that the confidentiality provisions of Title VII bar making this information available to the union.[35] The Board reasoned that the applicable section of Title VII,[36] binds only the governmental agency involved, the Equal Employment Opportunities Commission, and does not govern the relationships between private parties.[37] Further, the Board concluded that these confidentiality provisions were designed to prevent making available unproven charges to the *general public*, and thus were not meant to prohibit making such information available to a labor organization which, because of its relationship to employees and employer, is "far more concerned" with the issues involved than is the general public.[38]

The employer's affirmative action plans and accompanying work force analysis were the final items requested by the union and considered by the Board. The union, justifying its request for this information, contended that the affirmative action plans were relevant because an inspection of them might reveal that Westinghouse had undertaken committments inconsistent

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[30] *Id.*, 99 L.R.R.M. at 1491.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] The applicable statute, 42 U.S.C. § 2000e—8(e) (1976), reads as follows:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title.

[37] 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1491.

[38] *Id.* The Board did, however, take cognizance of one of the purposes of the confidentiality requirement: to protect the identity of the complaining party. Thus the Board ordered Westinghouse to delete from the complaints and charges turned over to the union the names of the charging parties. *Id.*

with its collective bargaining agreement with the IUE.[39] The Board disagreed, holding that the affirmative action plan was not "reasonably necessary" to enable the union to administer the contract, and thus was not presumptively relevant to the bargaining process.[40] The Board further suggested that even if the union's speculation that Westinghouse had undertaken obligations inconsistent with the collective bargaining agreement were true, the IUE would have remedies available to deal with it.[41] Consequently, the Board reversed this portion of the ALJ's decision and determined that the union was not entitled to access to Westinghouse's affirmative action plan.[42] A contrary result, however, was reached with respect to the work force analysis. The Board, noting that at least some of the information contained in the work force analysis was similar to the statistical data previously ordered to be produced,[43] held that the union was entitled to copies of the analysis. Westinghouse was, however, entitled to delete any information "unrelated" to the statistical data.[44]

B. *East Dayton Tool & Die Co.*

In the companion case to *Westinghouse, East Dayton Tool & Die Co.*,[45] the union, against the IUE, requested from the employer, East Dayton, data concerning the total number of males, females, whites, blacks and other minorities who sought employment, and the total number in each group who actually were hired by East Dayton in 1973 and 1974.[46] When the employer refused to honor this request, the IUE filed an unfair labor practice charge with the NLRB. The Administrative Law Judge, finding that the union was entitled to this information, ordered East Dayton to comply with the union request.[47]

The Board affirmed the order of the ALJ, concluding that the union had successfully shown the relevance of information concerning job applicants to the collective bargaining process.[48] The Board noted that the parties them-

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[39] *Id.*, 99 L.R.R.M. at 1492.

[40] *Id.*

[41] *Id.* The Board also rejected the union's contention that federal regulations, in particular 41 C.F.R. § 60-2.21(a)(6), *required* union involvement in employer affirmative action plans. The Board concluded that although this regulation did suggest and encourage such participation, it did not mandate union involvement. *Id.*

[42] *Id.*, 99 L.R.R.M. at 1492.

[43] *Id.* See text and notes at notes 18-26 *supra.*

[44] *Id.*, 99 L.R.R.M. at 1492.

[45] 239 N.L.R.B. No. 20, 99 L.R.R.M. 1501.

[46] *Id.*, 99 L.R.R.M. at 1501. The union also requested that the employer state the reason or reasons why so few females and blacks were employed by East Dayton, and sought copies of East Dayton's master health insurance agreements. The Board, reversing the ALJ, refused to order the employer to respond to the "subjective" question regarding the reasons for the alleged small numbers of female and black employees. *Id.*, 99 L.R.R.M. at 1502. The Board, also overruling the ALJ, held that the insurance agreements should be produced since they concerned unit employees. *Id.*

[47] *Id.*, 99 L.R.R.M. at 1501.

[48] *Id.* Since the Board concluded that the union had demonstrated the relevance of the requested information concerning job applicants, it did not reach the

selves had negotiated a contract which contained an express prohibition of discrimination in hiring. Further, the Board emphasized the union's expressed concern that the requested information might be needed to defend the union against potential charges of discrimination based upon alleged acquiescence in East Dayton's discriminatory hiring practices.[49] Such a motivation, stated the Board is "not inconsistent" with the union's representative function.[50] Therefore, the Board affirmed the ALJ's order that East Dayton provide the union with the requested information.[51]

C. *Union Access to Information After* Westinghouse *and* East Dayton

The holdings of and modes of analysis in *Westinghouse* and *East Dayton* present a number of significant developments; most important among these is the possibility that *Westinghouse* may be viewed as broadening drastically the scope of union liability for breach of its duty of fair representation. The *Westinghouse* Board, noting the relevance to the labor union of information relat-

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question of whether such data is "presumptively" relevant. *Id.*, 99 L.R.R.M. at 1501 n.6.

[49] *Id.*, 99 L.R.R.M. at 1501.

[50] *Id.*

[51] *Id.* In vigorous dissents, Board member Murphy sharply disagreed with her colleagues in both *Westinghouse* and *East Dayton* and objected to making the information available to the unions. *Westinghouse*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1493-99; *East Dayton*, 239 N.L.R.B. No. 20, 99 L.R.R.M. at 1502-05. Member Murphy's major concern was that by making information relating to race, sex and Spanish surname available to the union, and by implying that unions would be liable for "passive ignorance" of employers' discriminatory practices, the Board was, in effect, placing an obligation upon unions to seek out and act upon such information. In the *Westinghouse* context, this obligation relates to the union's duty of fair representation. *Westinghouse*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1495. While no such duty can arise in *East Dayton*, where only job applicants are involved, Member Murphy contended that the Title VII liability of unions may be broadened by the majority's decision. Now, claimed Member Murphy, labor unions may find themselves being held jointly liable for the employer's unilateral discriminatory hiring. *East Dayton*, 239 N.L.R.B. No. 20, 99 L.R.R.M. at 1503.

Member Murphy also disagreed with the *Westinghouse* Board's requirement that the employer make available to the union charges and complaints of fair employment practices law violations. *Westinghouse*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1497-98. She argued that the confidentiality requirements of Title VII forbid making such information available to anyone outside of the government. *Westinghouse*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1498. The Board, Member Murphy contended, has no power to make section 8(a)(5) of the Labor Act supercede confidentiality statutes.

Member Murphy also raised several technical objections to the unions' requests. In *Westinghouse*, she maintained that section 8(a)(5) does not require an employer to supply information to a union where the union—like the IUE in *Westinghouse*—sought the information for purposes other than collective bargaining, i.e. for purposes of prosecuting a Title VII suit against the employer. *Westinghouse*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1496-97. In *East Dayton*, Member Murphy contended that the International Union was not the proper party to request the information. *East Dayton*, 239 N.L.R.B. No. 20, 99 L.R.R.M. at 1503 n.16. She also maintained that, as in *Westinghouse*, the union intended to use the information for purposes not relating to collective bargaining; to defend against charges that the union acquiesced in the employer's discriminatory hiring practices. *East Dayton*, 239 N.L.R.B. No. 20, 99 L.R.R.M. at 1504.

ing to the racial, ethnic and sexual composition of the bargaining unit, stated that such information might be needed by the union to fulfill its duty of fair representation, and to avoid liability for "passive ignorance" of the employer's discriminatory practices.[52] When viewed from this perspective, the Board's opening employers' race/sex/Spanish surname data to the union may imply a corresponding *obligation* to seek out and act upon such information by the labor organization. It is suggested, however, that the Board's ruling need not be read so broadly.

Although it is not to be doubted that the duty of fair representation can be breached by union inaction as well as by union action,[53] it is not at all clear that, in all circumstances, the union is obligated to take some action to avoid being held vicariously liable for its "passive ignorance" of the discriminatory practices of the employer. As traditionally construed by the courts, the duty of fair representation does not impose such liability upon labor organizations. The Supreme Court has stated that the union's duty to its members is breached only if the union's conduct is "arbitrary, discriminatory or in bad faith."[54] While there may be instances where a labor organization's failure to act would violate this standard, other situations may be envisioned where such a failure to act does *not* rise to the level of arbitrary, discriminatory or bad faith conduct. Thus, to read *Westinghouse* to stand for the proposition that a union's failure to act concerning an employer's discriminatory practices renders the union, in almost all circumstances, vicariously liable under its duty of fair representation, simply is not in accord with established judicial interpretations of the union's duty to its members.

This reading of *Westinghouse*, standing for a requirement that a union actively seek out evidence of the discriminatory practices of the employer, also does not necessarily follow from prior Board law. The *Westinghouse* Board, in discussing the parameters of the union's duty of fair representation, cited the Board's 1964 *Business League of Gadsden*[55] decision as holding that a union is required to act affirmatively to oppose the employer's discriminatory employment practices by proposing specific contractual provisions to that end. *Gadsden* certainly did order such action on the part of the union;[56] yet, the *Gadsden* Board did not require that *all* labor organizations bargain actively to eradicate discrimination under all circumstances. Rather, the *Gadsden* order was a specific remedial order aimed at remedying both employer *and* union discrimination.[57] Thus, the *Westinghouse* Board was not merely restating existing Board law in intimating that the union had a general requirement to seek out and respond to employer discrimination. It is unclear whether the *Westinghouse* majority simply was overstating prior Board law concerning the

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[52] *Westinghouse*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1486.

[53] Local Union No. 12 (Business League of Gadsden), 150 N.L.R.B. 312, 315, 57 L.R.R.M. 1535, 1536 (1964), *enf'd.* 368 F.2d 12, 63 L.R.R.M. 2365 (5th Cir. 1966).

[54] Vaca v. Sipes, 386 U.S. 171, 190 (1967).

[55] 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964), *enf'd.* 368 F.2d 12, 63 L.R.R.M. 2365 (5th Cir. 1966).

[56] *Id.* at 322, 57 L.R.R.M. at 1540.

[57] Member Murphy makes this point in her dissenting opinion in *Westinghouse Electric*. 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1495 n. 65.

union's duty of fair representation as a means of establishing the relevance of data relating to the racial, sexual or ethnic makeup of unit employees, or whether *Westinghouse* itself was greatly expanding Board law regarding the duty of fair representation.[58]

A further problem raised by *Westinghouse* and *East Dayton* was the Board's conclusion that the confidentiality provisions of Title VII were not applicable. The Board justified this conclusion on two grounds: first, the Board contended that the statute's guarantee of confidentiality barred only the government agency, the Equal Employment Opportunities Commission, from releasing the information, and did not concern the relations between private parties, such as unions and employers; second, the Board suggested that labor unions were not members of the "general public" to whom disclosure is prohibited by the statute.[59] Thus the Board concluded that since there was to be no *disclosure by* the agency restricted by the confidentiality provisions, and since there was no *disclosure to* the general public, it could safely order the employer to make available to the union copies of the requested charges and complaints without running afoul of the purposes of the confidentiality statutes. It is submitted that although the second justification does not appear to be in accord with existing judicial interpretations of Title VII, the first justification is supported by the current state of the law. Accordingly, the Board was correct in disregarding the confidentiality provisions of Title VII.

The weakest basis upon which the confidentiality provisions of Title VII can be dismissed in the *Westinghouse* context is the Board's second argument: that *disclosure to* a labor union, because of the union's special obligations and relationships to employment practices, is not disclosure to the general public and thereby not prohibited under section 709 of the Civil Rights Act.[60] Neither the federal courts nor the Equal Employment Opportunities Commission have reached this issue. Several federal courts have considered, however, a somewhat analogous issue: whether private Title VII plaintiffs are members of the public to whom the EEOC may not disclose confidential information.[61] On that issue, the circuits are split. While the Fifth Circuit has held that private Title VII plaintiffs are *not* members of the public, and thus that

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[58] A related problem to the duty of fair representation, and one focused upon by Member Murphy, see note 40 *supra*, is an arguable increase in Title VII liability by allowing the unions access to information concerning employers' hiring practices. 42 U.S.C. § 2000e—2 (1976) makes it unlawful for a labor organization to discriminate itself or to cause an employer to discriminate. The Equal Employment Opportunities Commission has held unions liable under Title VII for employer discrimination that the union is aware of or should be aware of. 2 E.E.O.C. Dec. 77-10 EMPL. PRAC. GUIDE (CCH) ¶ 6565. As Member Murphy points out, the EEOC has not yet held labor unions liable under Title VII for an employer's unilateral hiring decisions. *East Dayton*, 239 N.L.R.B. No. 20, 99 L.R.R.M. at 1503. The question remaining is, since the *East Dayton* Board entitled the labor organization to information concerning job applicants, does this increased access impose upon the union increased Title VII liability?

[59] *Westinghouse Electric*, 239 N.L.R.B. No. 19, 99 L.R.R.M. at 1491.

[60] 42 U.S.C. § 2000e—8(e) (1976), set out in full at note 30 *supra*.

[61] Burlington Northern, Inc. v. EEOC, 582 F.2d 1097, 17 F.E.P. Cases 1358 (7th Cir. 1978); Sears, Roebuck & Co. v. EEOC, 581 F.2d 941, 17 F.E.P. Cases 897 (D.C. Cir. 1978); H. Kessler & Co. v. EEOC, 472 F.2d 1147, 5 F.E.P. Cases 405 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

the EEOC may provide them with otherwise confidential information,[62] the Seventh and District of Columbia Circuits have arrived at an opposite conclusion and have halted EEOC attempts to provide plaintiffs with the protected materials.[63]

The Fifth Circuit reasoning, that certain classes of individuals may be in such a relationship that they should not be considered members of the general public and denied access to "confidential" information,[64] provides at least some measure of support for the Board's conclusion that disclosure to a labor union is not forbidden under Title VII. Yet the contrary view, expressed by the Seventh and District of Columbia Circuits, that "Title VII was never meant to permit dissemination of EEOC investigative data to anyone not within the government"[65] seriously undermines the Board's decision in this regard. The National Labor Relations Board, unlike the federal courts or the EEOC, is not given principal authority for interpretation of Title VII, and perhaps overstepped its proper bounds in seeking to justify its conclusion on the basis of Title VII law, law that is currently in much dispute.

Despite the arguable impropriety of the Board's second reason for its conclusion, the Board's decision can ultimately be justified. The Board's first justification—that the confidentiality provisions of the statute involved forbid only disclosure by the EEOC, and not disclosure by other bodies—is well in line with prevailing federal law. Without exception, every federal court which has considered the question has held that section 709 of Title VII forbids disclosure only by the EEOC.[66] Disclosure by private parties, and disclosure by *other* agencies of the federal government are beyond the statute's prohibition.[67] Upon this basis, an NLRB order that the employer provide the labor organization with the information would not be limited by the provsions of the confidentiality statute. The Board's decision on this matter was, therefore, correct.

Westinghouse and *East Dayton* undoubtedly leave many questions unanswered. On the practical level, entire new categories of information concerning the racial, sexual and ethnic makeup of the unit workforce and

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[62] H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152, 5 F.E.P. Cases 405, 408 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

[63] Burlington Northern, Inc. v. EEOC, 582 F.2d 1097, 1100, 17 F.E.P. Cases 1358, 1360 (7th Cir. 1978); Sears, Roebuck & Co. v. EEOC, 581 F.2d 941, 947, 17 F.E.P. Cases 897, 902-03 (D.C. Cir. 1978).

[64] H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152, 5 F.E.P. Cases 405, 408 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

[65] Sears, Roebuck & Co. v. EEOC, 581 F.2d 941, 946, 17 F.E.P. Cases 897, 901 (D.C. Cir. 1978).

[66] *See* Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1188, 15 F.E.P. Cases 1217, 1230 (3rd Cir. 1977); Sears, Roebuck & Co. v. General Services Administration, 509 F.2d 527, 529, 8 F.E.P. Cases 1296, 1297-98 (D.C. Cir. 1974); National Resources Defense Council v. SEC, 432 F. Supp. 1190, 1210 n. 84, 14 F.E.P. Cases 1544, 1557 n. 84 (D.D.C. 1977); Metropolitan Life Insurance Co. v. Usery, 426 F. Supp. 150, 157, 14 F.E.P. Cases 83, 89 (D.D.C. 1976).

[67] *See* Sears, Roebuck & Co. v. General Services Administation, 509 F.2d 527, 529, 8 F.E.P. Cases 1296, 1298 (D.C. Cir. 1974); National Resources Defense Council v. SEC, 432 F. Supp. 1190, 1210 n. 84, 14 F.E.P. Cases 1544, 1557 n. 84 (D.D.C. 1977).

applicant pool now are available to labor organizations. The extent to which unions will seek this information, and the purposes for which they will use the information that they do obtain, can only be speculative. Also left open is the question of union *liability* for discriminatory employment practices carried on by the employer. Does *Westinghouse* actually reach as far as its language suggests in imposing an *obligation* on the union to seek out information relating to the employer's hiring and employment practices? If so, the increased union "right" of access may seem a hollow victory indeed.

Westinghouse and *East Dayton* stand as perhaps pivotal cases in the area of law where labor relations and equal employment opportunity intersect. At a minimum, by making information relating to the racial, sexual and ethnic makeup of the employer's workforce and applicant pool available to the union, these cases provide the opportunity for a stronger role by the union in monitoring the employer's practices and enforcing antidiscrimination statutes. The extent to which labor organizations will avail themselves of this opportunity remains to be seen. It seems clear, however, that if the *Westinghouse* Board can be taken at its word in asserting that labor unions will be held liable for "passive ignorance" of the employer's discriminatory practices, aggressive union action should be expected to increase.

2. *Duty to Bargain*

a. *Partial Closings:* Brockway Motor Trucks—Among the responsibilities which the National Labor Relations Act[1] (Act) places upon employers and labor unions subject to its terms is the duty to "bargain collectively." As defined by section 8(d)[2] of the Act, this duty places a mutual obligation upon the employer and labor organization to "meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Failure to heed this statutory command subjects the employer or labor union to unfair labor practice charges under sections 8(a)(5)[3] or 8(b)(3)[4] of the Act. As a corollary to the employer's duty in this regard, it is well settled that an employer may not unilaterally institute a change in a madatory subject of bargaining—a subject falling within the scope of the phrase "wages, hours and terms and conditions of employment." An employer who does alter any mandatory subject of bargaining concerning his employees without prior notification and discusion of such an alteration with the employee's representatives therefore commits a violation of section 8(a)(5).

Despite these established principles, there are uncertainties regarding the employer's duty to bargain. Often, the question is whether a particular subject falls within the scope of the phrase "terms and conditions of employment," since it is only subjects within the purview of this phrase that trigger the bar-

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[1] 29 U.S.C. §§ 151, *et seq.*, (1976).
[2] 29 U.S.C. § 158(d) (1976).
[3] 29 U.S.C. § 158(a)(5) (1976).
[4] 29 U.S.C. § 158(b)(3) (1976).

gaining obligation. Because the Act does not define or otherwise give content to this phrase, it has been left to the National Labor Relations Board (NLRB) and the federal courts to establish its reach. Certain subjects, such as vacations[5] and pensions,[6] have long been established and accepted as within the scope of "terms and conditions of employment" and as being, therefore, mandatory subjects of bargaining. As to other subjects, however, the applicability of the statutory obligation to bargain is less well-settled.

One area in which the bargaining obligation is in question is that of partial closings: Must an employer, who operates two or more facilities and who chooses to close one facility, bargain with the union representing the employees at the closing plant regarding the decision?[7] There has been a good deal of tension between the NLRB and the federal courts of appeal concerning the answer to this question. While the Board generally has taken the position that a partial closing decision *is* a mandatory subject of bargaining,[8] several courts of appeal have held that such a decision is solely within the prerogative of management and, therefore, not subject to the bargaining requirement.[9] During the *Survey* year, a court of appeals again was faced with the issue of an employer's obligation to bargain concerning a partial clos-

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[5] Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360, 369, 31 L.R.R.M. 1072, 1075 (1952).

[6] Inland Steel Co. v. NLRB, 170 F.2d 247, 255, 22 L.R.R.M. 2507, 2514 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

[7] It is well settled, however, that an employer is required to bargain over the effects on employees of a partial closing decision at the affected plant. NLRB v. Thompson Transport Co., 406 F.2d 698, 703, 70 L.R.R.M. 2418, 2421 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 940, 65 L.R.R.M. 2861, 2866 (9th Cir. 1967). A partial closing for reasons of anti-union animus may be a violation of section 8(a)(3) of the Act. Textile Worker's Union v. Darlington Mfg. Co., 380 U.S. 263, 274-75 (1965).

[8] Royal Typewriter Co., 209 N.L.R.B. 1006, 1012-13, 85 L.R.R.M. 1501, 1509-10 (1974); Ozark Trailers, Inc., 161 N.L.R.B. 561, 564-70, 63 L.R.R.M. 1264, 1266-69 (1966). *Cf.* Schnell Tool & Die Corp., 162 N.L.R.B. 1313, 1316-17, 64 L.R.R.M. 1184, 1185 (1967) (employer's failure to bargain concerning decision to lease plant out a violation of § 8(a)(5)). The Board has recognized an exception to this bargaining rule. An employer whose partial closing takes him out of a particular business is not required to bargain concerning the decision. The employer retains the right to go out of business. Kingwood Mining Co., 210 N.L.R.B. 844, 845, 86 L.R.R.M. 1203, 1204 (1974); Summit Tooling Co., 195 N.L.R.B. 479, 480, 79 L.R.R.M. 1396, 1400 (1972). *See also* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269-74 (1965) (employer who goes completely out of business, even if for anti-union reasons, does not violate section 8(a)(3)).

The Board has experienced some difficulty in distinguishing between a partial closing and an employer's "sale" of part of an enterprise, and has held that the latter does not require bargaining. General Motors Corp., 191 N.L.R.B. 951, 951-52, 77 L.R.R.M. 1537, 1539 (1971), *enf'd*, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972).

[9] NLRB v. Thompson Transport Co., 406 F.2d 698, 702-03, 70 L.R.R.M. 2418, 2421 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939, 65 L.R.R.M. 2861, 2866 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196, 60 L.R.R.M. 2033, 2035-36 (3rd Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108, 113, 60 L.R.R.M. 2084, 2088 (8th Cir. 1965). *But see* NLRB Winn-Dixie Stores, Inc., 361 F.2d 512, 516-17, 62 L.R.R.M. 2218 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966) (employer must bargain over decision to discontinue its cheese cutting and packaging operations).

ing decision. The Court of Appeals for the Third Circuit, in *Brockway Motor Trucks v. NLRB,*[10] rejected the *per se* approaches taken in prior Board and court decisions and held that whether an employer had an obligation to bargain with the union concerning a partial closing decision depends upon a consideration of the facts and circumstances of each particular case.[11]

Brockway Motor Trucks (Brockway), a division of Mack Trucks, Inc., operated a number of facilities involved in the manufacture, sale and servicing of trucks.[12] One of these facilities was located in Philadelphia, Pennsylvania, where Brockway's employees were represented by Local 724, International Association of Machinists and Aerospace Workers, AFL-CIO (union). On July 19, 1976 Brockway, without prior notification to or consultation with the union, shut down the Philadelphia facility.[13] In response to this action, the union filed an unfair labor charge against Brockway with the NLRB. The charge alleged that Brockway's failure to bargain with the union prior to closing the Philadelphia facility was a violation of sections 8(a)(1) and 8(a)(5) of the Act.[14]

The Board issued a complaint and a notice of hearing on the union's charge against Brockway. Waiving a hearing before an Administrative Law Judge, the union and Brockway then submitted the case directly to the full Board on a record consisting only of the pleadings and a stipulation that the Philadelphia plant closing was based on "economic considerations."[15] The Board, following its settled precedents in partial closing cases,[16] found Brockway's failure to bargain to constitute an unfair labor practice. The Board issued an order requiring, *inter alia,* that Brockway bargain with the union concerning the closing, and a possible reopening, of the Philadelphia plant.[17] Brockway then petitioned the Court of Appeals for the Third Circuit for review of the Board's decision,[18] and the Board filed a cross-application for enforcement of its order.

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[10] 582 F.2d 720, 99 L.R.R.M. 2013 (3d Cir. 1978).

[11] *Id.* at 731, 99 L.R.R.M. at 2021.

[12] *Id.* at 723, 99 L.R.R.M. at 2015.

[13] *Id.* At the time the plant was shut down, employees of the plant were engaged in a strike over the inability to reach agreement on a new collective bargaining agreement. Neither the Board nor the court attached any importance to this fact in considering the issue at hand.

[14] *Id.* No issue was raised regarding bargaining over the effects of the closing on Brockway's employees. See note 7 *supra.*

[15] 582 F.2d at 723, 99 L.R.R.M. at 2015.

[16] See cases cited at note 8 *supra.*

[17] The Board's Decision and Order are reported at 230 N.L.R.B. 1002, 95 L.R.R.M. 1462 (1977). The Board also ordered Brockway to make the employees whole by paying the employees backpay from the date of the employees' termination to the date of commencement of bargaining. Further, the Board ordered reinstatement of all former Brockway employees at the Philadelphia facility if operations were to be resumed at that plant. *Id.* at 1004-05, 95 L.R.R.M. at 1463-64.

[18] Section 10(f) of the Act, 29 U.S.C. § 160(f) (1976), provides for judicial review of final orders of the Board. Appeal can be made either to the District of Columbia Court of Appeals or to the court of appeals for the circuit where the alleged unfair labor practice was committed. In the present case, the alleged unfair labor practice occurred in Philadelphia, in the Third Circuit.

The court denied enforcement of the Board's order,[19] and, in doing so, registered its disapproval of the Board's contention that partial closing decisions are always mandatory subjects of bargaining. Yet, the court also stopped far short of embracing Brockway's assertion that such a decision, if based upon "economic considerations" of *any* degree or magnitude, is always beyond the scope of mandatory bargaining. The *Brockway* court, by adopting this approach, was consciously seeking to remain faithful to its perceived duty to accommodate the two conflicting policies and philosophies implicated by the partial closing issue. On the one hand there are the concerns which the NLRB seeks to protect: namely, the protection of the jobs of employees and the strengthening of the collective bargaining process. On the other hand are the policies advanced by Brockway: the business interests and economic freedom of the employer, which also deserve protection. The court argued that the *per se* approaches of both the Board and Brockway failed to take into consideration the countervailing interests represented by the opposite view. An adequate weighing of *all* of the concerns involved, stated the court, requires the rejection of any rigid *per se* rule and the substitution of a more flexible approach that takes into consideration the parties' concerns as they relate to and are involved in each particular case.[20]

In establishing the framework for applying this balancing approach in the partial closing context, the *Brockway* court first considered the policies of the NLRA and the Act's committment to the efficacy of collective bargaining as a means of bringing about the peaceful resolution of labor disputes.[21] The court stated that these basic policies would be furthered by requiring bargaining with regard to partial closing decisions.[22] Further, the court noted that the act of closing a facility comes within the literal language of "terms and conditions of employment." In this regard, the court cited the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB*.[23] The *Fibreboard* Court, in holding that an employer's decision to subcontract work previously performed by union members was a mandatory subject of bargaining,[24] asserted that the termination of employment resulting from such subcontracting clearly was within the definition of "terms and conditions of employment."[25] The *Brockway* court, noting that the partial closing of a business leads to the termination of employees' jobs no less than does subcontracting out work previously performed by employees, adopted this reasoning of the *Fibreboard* Court and placed partial closings within the statutory requirement of bargaining.[26] Based upon these factors of statutory policy and language, the court concluded that an initial presumption was justified that a partial closing decision is a mandatory subject of bargaining.[27]

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[19] 582 F.2d at 740-41, 99 L.R.R.M. at 2027-28.
[20] *Id.* at 731, 99 L.R.R.M. at 2021.
[21] *Id.* at 734, 99 L.R.R.M. at 2023.
[22] *Id.*, 99 L.R.R.M. at 2023-24.
[23] 379 U.S. 203 (1964).
[24] *Id.* at 209.
[25] *Id.* at 210.
[26] 582 F.2d at 735, 99 L.R.R.M. at 2024.
[27] *Id.*

Working from this initial presumption, the *Brockway* court then moved to the next step of its analysis. To determine whether the duty to bargain regarding a *particular* partial closing arises, stated the court, it is necessary to engage in an equitable balancing of the relative interests of the employees and the employer in the circumstances of the particular case. On the employees' side of the balance, the prospect of job loss will be the chief concern.[28] Beyond this, however, an additional factor which may tilt the balance toward a requirement of bargaining is the possible efficacy of union efforts to prevent the closing, either through concessions designed to reduce the employer's costs or by providing useful information or technical assistance to the employer.[29] On the other side of the balance are factors which would make it difficult to insist upon bargaining in a specific situation. Giving due regard to the employer's freedom to conduct his business and to determine the ultimate economic direction of the company, the *Brockway* court suggested several circumstances which might weigh the balance against requiring bargaining in a particular case. These circumstances include situations where bargaining would be either fruitless or unfair to the employer: such as when action by a third party necessitates closing the plant, where the business is under severe financial pressure, or where there is a desire by the employer to restructure the business itself.[30] It is these types of situations, the court suggested, that will rebut the presumption of mandatory bargaining over the decision to close part of the business.

In evaluating the economic and other factors which might rebut the presumption of mandatory bargaining, however, the *Brockway* court made clear that the mere recitation, as in the *Brockway* case itself, that a closing was based on "economic considerations" would not excuse the employer from his obligation to bargain. The precise nature of the economic considerations involved must be shown in each particular case.[31] Not all partial closing decisions based on economic or financial factors are beyond the range of the bargaining requirement. Only where the economic or financial factors are of such a nature or degree that bargaining would be "unacceptable and unfair" can the employer escape the duty to bargain.[32] Having established the framework for determining whether bargaining is required in partial closing situations, the court refused to enforce the Board's order. The sparse record in the case at bar, claimed the court, was inadequate to allow any meaningful utilization of the balancing approach.[33] The balancing test simply could not be applied on the facts before the Court. Therefore, enforcement of the Board's order

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[28] *Id.*

[29] *Id.* at 736, 99 L.R.R.M. at 2024-25. The court also suggested that bargaining prior to the time of the closing would be a more useful and effective way for the union to bargain over the *effects* of the closing on employees, even if the closing itself could not be averted. *Id.*, 99 L.R.R.M. at 2025.

[30] *Id.* at 738, 99 L.R.R.M. at 2026.

[31] *Id.* at 739, 99 L.R.R.M. at 2026-27.

[32] *Id.* at 739-40, 99 L.R.R.M. at 2026-27.

[33] *Id.*, 99 L.R.R.M. at 2027.

was denied, without prejudice to the Board to commence additional proceedings in the case.[34]

The majority opinion in *Brockway* was challenged by a dissent from Judge Rosenn.[35] Judge Rosenn objected strenuously to the balancing approach advanced by the majority. In his view, the prior Third Circuit decision in *NLRB v. Royal Plating & Polishing Co.*,[36] in which the court denied enforcement of a Board order which required an employer to bargain concerning a partial closing decision, controlled the case at bar. As read by Judge Rosenn, *Royal Plating* stood for the proposition that a partial closing, when based upon any economic reason, may be made by an employer without producing any obligation to bargain with the union. Thus, the stipulation in *Brockway* that the closing was due to "economic reasons" would place the case, for Judge Rosenn, within the "four corners" of *Royal Plating*, and would not require bargaining.[37] Judge Rosenn also objected to the majority's attempt to distinguish between various degrees of economic impact.[38] Whether a partial closing was made for economic "considerations" or upon economic "necessity" would, in Rosenn's view be irrelevant, since the employer should have the right to shut down a facility for *any* economic or business reason without consultation with the union.[39] Judge Rosenn, therefore, would deny enforcement of the Board's order with prejudice, leaving no opportunity for additional Board proceedings.[40]

Brockway's balancing process is a rather unique approach to the partial closing problem. As the *Brockway* court itself notes, prior Board and court decisions have tended to draw a solid line exclusively on either the "bargaining required" or "bargaining not required" side of the issue. Thus, the *Brockway* decision seems to add some heretofore absent flexibility to consideration of the question. The soundness of this new, flexible "balancing" approach, however, is another matter. In many respects, the *Brockway* aproach may appear sound since it closely follows the reasoning of *Fibreboard Paper Products Corp. v. NLRB*, a leading Supreme Court pronouncement on the employer's duty to bargain. The *Fibreboard* Court, in holding that only a particular form of subcontracting was a mandatory subject of bargaining, showed a strong disinclination to make sweeping judgments as to the employer's obligation to bargain in *all* subcontracting decisions.[41] Rather, the Court geared its discussion—and its holding—only to the facts of the particular subcontracting decision in

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[34] *Id.* at 741, 99 L.R.R.M. at 2028. The court also suggested that the Board order might be unenforceable in any event, due to evidence that, by the time of oral argument in *Brockway*, Brockway had ceased *all* of its truck-related business operations. The bargaining order would then be a "futile" act that the court would not enforce. *Id.* at 740, 99 L.R.R.M. at 2028. *See also* NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 517, 62 L.R.R.M. 2218, 2222-23 (5th Cir. 1966).

[35] 582 F.2d at 741-50, 99 L.R.R.M. at 2028-35.

[36] 350 F.2d 191, 60 L.R.R.M. 2033 (1965).

[37] 582 F.2d at 743, 99 L.R.R.M. at 2030.

[38] See text and notes at notes 31-33, *supra*.

[39] 582 F.2d at 748-49, 99 L.R.R.M. at 2033-34.

[40] *Id.* at 750 & n.20, 99 L.R.R.M. at 2035 & n.20.

[41] 379 U.S. at 209.

the case before it.[42] In a like manner the *Brockway* court also avoids sweeping judgments and rigid *per se* rules in favor of case-by-case balancing. Yet, there are problems with the *Brockway* balancing approach. While it is, of course, true that factual balancing allows for a wider range of relevant factors which may be considered in a particular case, it also is true that the flexibility which the balancing approach allows may lead to difficulties in both administration and predictability. The approach which the Board has preferred, maintaining that partial closing decisions are, in almost every instance, mandatory subjects of bargaining,[43] obviously is easier to administer than is the balancing approach. Under *Brockway's* framework, the Board must consider a host of additional factors, and must be sure to make the correct "balance." *Brockway* thus imposes on the Board additional burdens by increasing the scope of the relevant inquiry in section 8(a)(5) partial closing cases.

The *Brockway* balancing approach also tends to make less predictable the results of proceedings brought by a labor union seeking to enforce an employer's duty to bargain over a partial closing decision. While the balancing approach provides flexibility, it does so at the cost of predictability and certainty of result. It makes planning and reliable legal advice difficult, both for an employer who wishes to know whether he should confer with the union, and for a labor union concerned with the probable success of a challenge to a unilateral partial closing by the employer. The case-by-case, factual balancing approach almost assures that very few definitive rules can arise to shape the conduct of the parties. Since the relevant facts vary with each individual case, it may be possible to establish whether there is a bargaining obligation only through case-by-case litigation, before the Board and in the courts.

These difficulties cannot be overlooked. They may, in fact, be of sufficient mangitude to make it unlikely that the National Labor Relations Board, or other circuit courts of appeal, will choose to follow the *Brockway* balancing approach. Yet, it should not be forgotten that the polar *per se* approaches of the Board and other courts of appeal have themselves led to much confusion, conflict and uncertainty in this area. To that extent, *Brockway* at least offers a middle ground that might defuse Board-court conflict. The ultimate impact and utility of the *Brockway* framework depends on two key factors: first, will the *Brockway* approach be adopted by other circuits and the Board, and second, will there be sufficient development of law in this area, within the framework of case-by-case balancing, to allow counsel, employers and labor organizations to plan their actions with reasonable certainty.

3. *Representation at Investigatory Hearings:* Climax Molybdenum

In 1975 the United States Supreme Court, in *NLRB v. Weingarten Inc.*,[1] held that section 7 of the National Labor Relations Act[2] guarantees the right of em-

[42] *Id.* at 210-15.

[43] See cases cited at note 8, *supra*.

[1] 420 U.S. 251 (1975).

[2] 29 U.S.C. § 157 (1976).

ployees to insist on union representation during employer investigatory interviews.[3] This right may be claimed whenever an employee reasonably believes that disciplinary measures may result from an interview.[4] The Court, however, did not state in *Weingarten* whether this right to representation included the right to confer with a union representative on company time prior to the investigatory interview. During the *Survey* year, the Court of Appeals for the Tenth Circuit in *Climax Molybdenum Co. v. NLRB*[5] refused to interpret the *Weingarten* rule as requiring a conference with union representatives at any point other than during the investigatory interview, provided that the interview is scheduled to enable the employee to confer with a union representative on his own time.[6] This refusal to require a pre-interview conference demonstrates that the Tenth Circuit, and other courts influenced by the reasoning of the *Climax* decision, will not expand the right guaranteed by *Weingarten* beyond reasonable limits. In interpreting the *Weingarten* rule, the interests of the employer demand consideration, and, when these interests clearly outweigh those of the employees and the union, a proper resolution of the dispute will lie in the employer's favor.

The facts surrounding the *Climax* decision are critical in evaluating the significance of the Tenth Circuit's holding. In 1974 two employees of the Climax Molybdenum Company (Company) were involved in an altercation while working in an underground mine.[7] Upon learning of this incident, the Company scheduled for the next day an investigatory meeting between its representatives, the two employees, and representatives of the Oil, Chemical and Atomic Workers Union (Union).[8] The Union representatives were informed of this meeting, but were not given the identities of the employees involved. These employees did not at any time request consultation with their Union representative.[9] The Union, however, requested an opportunity to confer with the employees prior to the meeting, but this request was denied.[10]

During the interview, the Union representative informed the employees that they need not cooperate with the Company and could remain silent.[11] Nevertheless, the employees decided to cooperate, and each described the incident.[12] After the interview, the Climax representatives decided to give the employees only verbal warnings regarding the incident. Although the employees were satisfied with the proceedings,[13] the Union subsequently filed an unfair labor practices charge under section 8(a)(1)[14] against the employer,

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[3] 420 U.S. at 260.

[4] *Id.* at 257.

[5] 584 F.2d 360, 99 L.R.R.M. 2471 (10th Cir. 1978).

[6] *Id.* at 365, 99 L.R.R.M. at 2474.

[7] *Id.* at 361, 99 L.R.R.M. at 2471.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* 99 L.R.R.M. at 2472.

[12] *Id.*

[13] *Id.* at 361-62, 99 L.R.R.M. at 2472. No grievances were filed by the employees as a result of the interview. *Id.*

[14] 29 U.S.C. § 158(a)(1) (1976) provides in relevant part:

It shall be an unfair labor practice for an employer—

claiming that the Company unlawfully interfered with the employee's section 7 rights by refusing to permit the pre-interview conference.[15] The Administrative Law Judge dismissed this complaint, holding that the NLRA does not require pre-interview conferences,[16] but, upon appeal, the Board reversed this decision and instead found that the Company's refusal constituted an unfair labor practice.[17]

Climax then petitioned for review of the Board's decision to the United States Court of Appeals for the Tenth Circuit, which denied enforcement of the Board's order.[18] The court reasoned that neither the rule announced in *Weingarten* nor the rationale underlying that decision was applicable under the facts of *Climax*. As interpreted by the circuit court, the *Weingarten* rule requires employees to request the presence of their union representative. Since these employees never made such a request, the court refused to permit the Union to rely on the *Weingarten* rule in its section 8(a)(1) claim.[19] The court also noted that the rationale underlying the *Weingarten* decision—preservation of parity between employees and employers—did not support expanding the *Weingarten* rule to include the instant situation.[20] The court, therefore, refused to enforce the Board's order.[21]

The court of appeals in *Climax* properly interpreted the *Weingarten* rule. The Supreme Court in *Weingarten* did not state whether section 7 provided a

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(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of the title.

Id.

[15] The Union claimed that the Company had unlawfully threatened the employees with reprisals because of their connection with the Union. *Id.* at 362, 99 L.R.R.M. at 2472.

[16] *Id.*

[17] The Board, in a 3 to 2 decision, found Climax in violation of 29 U.S.C. § 158(a)(1) (1976). 227 N.L.R.B. 1189, 1190, 94 L.R.R.M. 1177, 1178 (1977).

[18] Climax Molybdenum Co. v. NLRB, 584 F.2d 360, 365, 99 L.R.R.M. 2471, 2474 (10th Cir. 1978).

[19] *Id.* at 363, 99 L.R.R.M. at 2473. The court stated:

To hold that an employer must permit employees to consult with union representatives on company time, when the employees could have, but elected not to, consult with their union representatives on their own time is to place a harsh and unfair burden upon the employer . . . . There is in fact, no indication in this case that the employees were interested in seeking counsel from their union representative.

Id.

[20] *Id.* at 365, 99 L.R.R.M. at 2474. The court stated:

The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus we do believe that *Weingarten* requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time.

Id.

[21] *Id.*

right to union representation at times other than during investigatory interviews. Rather, the Court stated that the right to union counsel during investigatory interviews "arises only in situations where the employee requests representation."[22] Since the employees never requested union representation, it is clear that the Union could not rely on the *Weingarten* rule to demand participation in the interview itself, much less a pre-interview conference.

Similarly, the court's discussion of the rationale underlying *Weingarten*—the need to ensure fairness—also reflects a sound interpretation of the policy underlying that decision. The court, in weighing the comparative interests of the Company, the Union and the employees, indicated that the *Weingarten* right to union presence will not be extended to all aspects of a disciplinary confrontation. Section 7 of the NLRA should not require an employer to sacrifice his legitimate business interests by allowing pre-interview conferences on company time when ample opportunity has been afforded the Union to meet with the employees involved at some other time.[23] In balancing the interests involved, such a burden should not be imposed without sufficient justification.

The *Climax* decision, however, should not be interpreted as an absolute denial of the right of employees to a pre-interview conference with Union representatives. The denial in this instance involved an employer who held an interview 17½ hours after the employees were informed of the investigation.[24] The *Climax* court has indicated that should an employer schedule an interview at a time that would not provide the employee with a sufficient opportunity to confer with the union on other than company time, and the employee requests a pre-interview conference, the employer would be required to provide this opportunity.[25] The *Climax* decision can be interpreted, therefore, as expanding the *Weingarten* right to counsel in certain instances while also upholding the *Weingarten* purpose of maintaining a balance between interests of the company and the employees.

The *Climax* court, however, did not limit its discussion to those elements essential to its decision. In dicta the court also discussed the significance of the Union's policy of discouraging employee cooperation with the Company.[26] This policy was based on the Union's belief that information given by employees at investigatory interviews very often results in the employee's dismissal. The court determined that while the Union's contention may be valid, it does not alter the legitimacy of the interview as a fact finding operation, preliminary to any disciplinary action by the employer.[27] The court noted

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[22] 420 U.S. at 257.

[23] 584 F.2d at 365, 99 L.R.R.M. at 2474.

[24] *Id.* at 363, 99 L.R.R.M. at 2473.

[25] *Id.* at 365, 99 L.R.R.M. at 2474.

[26] *Id.* at 363-64, 99 L.R.R.M. at 2473-74.

[27] *Id.* at 364, 99 L.R.R.M. at 2473. The court noted that an employer has a legitimate business interest in resolving disputes between his employees in order to ensure, as the court states, "a smooth-running business operation." Personal

that the Union, due to its adversarial stance, may have waived any right to be present at these interviews. Nevertheless, since the employees had not requested a meeting with the Union representatives, and since the Company had scheduled the investigatory interview fairly, the court was not required to decide this issue.[28]

The *Climax* court's discussion of a possible forfeiture of the right to Union presence, although not the basis of the court's decision, is significant since it indicates the court's interpretation of the Union's role at investigatory interviews. As demonstrated by the court's discussion, the Tenth Circuit will strictly enforce the limits which the *Weingarten* decision places on the right to union presence. The *Climax* court noted that *Weingarten* prohibits "interference with legitimate employer prerogative."[29] *Weingarten* also provides that "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview."[30] The court of appeals interpreted these limits as prohibiting the union from taking an active role, by encouraging the employees to refuse cooperation.[31] The court suggested that *Weingarten* may prescribe forfeiture of the right to representation should the union engage in this practice.[32] Although this reasoning did not underlie the final decision, it stands as a warning that the Tenth Circuit in future cases will limit severely union activity in investigatory interviews.

The approach taken by the Tenth Circuit of denying pre-interview conferences, provided employees have ample opportunity to meet with their union representative on their own time, should be followed by the other circuits. This rule properly limits the right to request counsel to those instances when a denial would impose an unfair burden on the employee. Both the employer's and the employees' interests must be considered in determining the correct resolution of future disputes. By limiting the employer's obligation to provide union representation during disciplinary interviews, the Tenth Circuit in *Climax Molybdenum Co.* has taken a reasonable approach, calculated to preserve a proper balance between the interests involved.

4. *Discipline for Failure to Cross Picket Lines:* William S. Carroll

Employee refusals to cross union-organized picket lines are a fertile ground for disputes regarding the protection created by the National Labor Relations Act (NLRA).[1] During the *Survey* year, the Court of Appeals for the

animosities between employees were not only contrary to the business interest of the Climax Molybdenum Company, but also presented serious safety hazards considering the context of an underground mine. The investigatory interview is intended to be a fact-finding meeting in which problems may be resolved in a spirit of cooperation. *Id.* at 363, 99 L.R.R.M. at 2473.

[28] *Id.* at 365, 99 L.R.R.M. at 2474.

[29] *Id.* at 363, 99 L.R.R.M. at 2473. *See Weingarten*, 420 U.S. at 258.

[30] 420 U.S. at 259.

[31] 584 F.2d at 363, 99 L.R.R.M. at 2473.

[32] *Id.* at 364-65, 99 L.R.R.M. at 2473-74. *See id.* at 365, 99 L.R.R.M. at 2474 (McKay, J., concurring).

[1] 29 U.S.C. § 151-169 (1976).

First Circuit dealt with one such dispute in *NLRB v. William S. Carroll, Inc.*[2] The court in *Carroll* considered whether an employer violates section 8(a)(1) of the NLRA[3] when he discharges an employee who, during the course of his work, has refused to cross a picket line established by a stranger union at the premises of a stranger employer.[4] The court determined that a proper resolution of the dispute required a balancing of the interests involved in the dispute, and that, in the present situation, there was insufficient anti-union animus on the part of the employer to tilt this balance in the employee's favor.[5] The *Carroll* court, therefore, denied enforcement of the National Labor Relations Board's (NLRB or Board) order to reinstate the discharged employee.[6]

This chapter, first, will examine the facts of the decision and the test established by the First Circuit in *Carroll*. The chapter then will consider the approach taken by the NLRB and the other circuit courts when faced with similar issues. It will be submitted that, despite the *Carroll* court's claim that it need not decide whether such conduct is protected activity under section 7, the test established by the First Circuit, in effect, constitutes a refusal to recognize the section 7 protection. It will be shown that the *Carroll* test favors employers heavily, and, unless altered, will not protect sufficiently employee rights.

In the instant case, the employer, William S. Carroll, operated a school bus and charter service in Watertown and Brookline, Massachusetts.[7] The employee, Lawrence Rosenberg, was on his first day of work for the company as a driver, when the dispatcher instructed Rosenberg to pick up passengers in front of a supermarket and to deliver them to a place where, due to a labor dispute, a group of employees was picketing. Rosenberg showed reluctance, but, after the dispatcher offered to drive the charter himself, agreed to take the assignment. He picked up the passengers and drove them to their destination point, but refused to enter onto the picketed employer's property.[8] When Rosenberg continued to refuse to cross the picket line, the police cleared a way for the passengers to disembark from the bus and to walk through the picket line onto the grounds and into the building. Rosenberg, thus, was able to honor the established picket line. When Rosenberg reported for work the following day, however, he was dismissed on the grounds that he had not finished his assigned task—to deliver the passengers to their destination.[9] The union then filed a complaint with the NLRB.[10]

Upon considering the union complaint, the Administrative Law Judge (ALJ) determined that the employer had violated section 8(a)(1) of the NLRA.

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[2] 578 F.2d 1, 98 L.R.R.M. 2848 (1st Cir. 1978).

[3] 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) provides in pertinent part:
"It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

[4] 578 F.2d at 2, 98 L.R.R.M. at 2848.

[5] *Id.* at 3-5, 98 L.R.R.M. at 2848-51.

[6] *Id.* at 5, 98 L.R.R.M. at 2851.

[7] *Id.* at 2, 98 L.R.R.M. at 2848.

[8] *Id.*, 98 L.R.R.M. at 2849.

[9] *Id.*

[10] William S. Carroll, Inc., 232 N.L.R.B. 1131, 97 L.R.R.M. 1037 (1977).

The ALJ stated, "a discharge motivated in part by an employee's exercise of Section 7 rights is a violation of the Act, even though a valid cause may also be present."[11] The ALJ, therefore, ordered the employer to reinstate the discharged employee.[12] The Board affirmed the ALJ's decision, stating that the employer violated Rosenberg's section 7 right to honor a picket line.[13] The employee's action was protected, the Board determined, even though the employer lost some business from his customer—the picketed employer—and even though he believed in good faith that the employee had engaged in misconduct.[14] The Board, however, emphasizing its firm stand in protecting the section 7 activity, disagreed with the ALJ dicta that the employer may have had a valid reason for discharging Rosenberg.[15]

In reviewing the Board's order, the First Circuit interpreted the standard established by the Board as "plac[ing] the burden of proof on the employer to establish that the dominant motive for the discharge was a valid business reason."[16] The court disagreed with this approach, and, instead, placed the burden of showing discriminatory intent, on the Board. The court stated in this regard that:

> Once the employer has demonstrated a legitimate business reason for the dismissal, the burden shifts to the Board to establish that the primary motivation for the discharge was to penalize the employee for his conduct sympathetic to picketers.[17]

In summary, once the employer offers a legitimate business justification for the discharge, the Board must rebut the inference of legitimacy by showing that the discharge was discriminatorily motivated.

The *Carroll* court found the employer's assertion that Rosenberg engaged in misconduct worthy of discharge—his failure to perform his assigned duty—sufficient to establish a legitimate business reason for the discharge.[18] The court then made a factual finding that there is not "substantial evidence [to show] that Rosenberg's expressed sympathy for the . . . picketers was the dominant reason for his discharge."[19] Applying its analysis of the burden of proof, the *Carroll* court concluded that the Board had failed to meet its burden of demonstrating anti-union animus.[20]

In its opinion, the court cites decisions of the Second, Fifth, Seventh, Eighth and District of Columbia Circuit courts, noting that these courts have split on the issue whether to recognize section 7 protection for the employee

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[11] *Id.* at 1134, 97 L.R.R.M. at 1038. *See* 578 F.2d at 3 n.2.
[12] 232 N.L.R.B. at 1135, 97 L.R.R.M. at 1038.
[13] *Id.* at 1131, 97 L.R.R.M. at 1037.
[14] *Id.* at 1133, 97 L.R.R.M. at 1037.
[15] *Id.* at 1131 n.1, 97 L.R.R.M. at 1038 n.1.
[16] 578 F.2d at 3 n.2, 98 L.R.R.M. at 2850 n.2.
[17] *Id.* at 4, 98 L.R.R.M. at 2850 (citations omitted). This standard, the court stated, is in accord with the standard employed by the court in Section 8(a)(3) cases, where the First Circuit also requires a showing of anti-union animus as the employer's *primary* motive. *Id.*
[18] *Id.* at 5, 98 L.R.R.M. at 2851.
[19] *Id.*, 98 L.R.R.M. at 2850.
[20] *Id.*, 98 L.R.R.M. at 2851.

activity.[21] The *Carroll* court characterized the Eighth Circuit as one of two circuit courts that have refused to recognize the honoring of a picket line as a protected section 7 activity,[22] and cited *Montana-Dakota Utilities Co. v. NLRB*[23] as representative of the Eighth Circuit's position. This decision, however, does not refuse to recognize the protected section 7 right. Rather, in *Montana-Dakota* the Court of Appeals for the Eighth Circuit specified that "[we] shall assume for the purposes of this case that the employees have a protected right under § 7 of the Act."[24]

In *Montana-Dakota*, eight employees had been suspended from work for refusing to cross a stranger union picket line at a construction site to complete their job assignment of installing underground pipes.[25] The eight employees wanted to return to work after the picket line had been withdrawn, but the employer insisted on a standard thirty-day suspension period, without pay.[26] These employees then filed a section 8(a)(1) complaint with the Board. The Board found for the employees and ordered the employer to pay lost wages from the date the picket line had been withdrawn to the date of reinstatement.[27] Although the Eighth Circuit refused to enforce the Board's order,[28] the court's decision resulted from its interpretation of the collective bargaining agreement as waiving the section 7 right to honor stranger union picket lines.[29] The court expressly assumed the existence of the section 7 right, to honor stranger union picket lines, but found that the suspension of the employees was subject to arbitration according to the terms of the agreement.[30] Since the right had been waived in the contract, the union was prevented from going to the Board with a section 8(a)(1) complaint. Thus, the Eighth Circuit has at least implicitly acknowledged a section 7 right to honor stranger union picket lines.

The *Carroll* court identified the Seventh Circuit as the second of two circuit courts that have refused to recognize the section 7 right,[31] and cited the Seventh Circuit's 1951 decision in *NLRB v. Illinois Bell Telephone Co.*[32] as representative of this position. In *Illinois Bell*, eight workers were threatened with suspension for refusing to cross a picket line of a union which was picketing the employees' own work place.[33] When the eight employees returned to

[21] *Id.* at 3, 98 L.R.R.M. at 2849. The court stated that the Seventh and Eighth Circuits have refused to recognize a refusal to cross a stranger union picket line as protected activity under section 7 of the NLRA, while the Second, Fifth and District of Columbia Circuits have recognized honoring a picket line as protected activity, but only in the factual context of picketing against the employee's own employer. *Id.*

[22] *Id.*

[23] 455 F.2d 1088, 79 L.R.R.M. 2854 (8th Cir. 1972).

[24] *Id.* at 1091, 79 L.R.R.M. at 2856.

[25] *Id.* at 1090-91, 79 L.R.R.M. at 2856.

[26] *Id.* at 1090, 79 L.R.R.M. at 2856.

[27] Montana-Dakota Utils. Co., 189 N.L.R.B. 879, 884, 77 L.R.R.M. 1029, 1033 (1971).

[28] 455 F.2d at 1094, 79 L.R.R.M. at 2858.

[29] *Id.* at 1093, 79 L.R.R.M. at 2857-58.

[30] *Id.* at 1091-94, 79 L.R.R.M. at 2856-58.

[31] 578 F.2d at 3, 98 L.R.R.M. at 2849.

[32] 189 F.2d 124, 28 L.R.R.M. 2079 (7th Cir. 1951), *cert. denied*, 342 U.S. 885 (1951).

[33] *Id.* at 126, 28 L.R.R.M. 2080.

work after the picketing ended, the employer demoted them to lower positions and at lower salaries than they had been receiving previously.[34] The court rejected the employees' complaint, reasoning that protected "concerted activities" under the pre-1947 Act were only those activities agreed upon by the whole bargaining unit and sanctioned by the union representative.[35] Since the suspended employees' union had not called for its members to honor the stranger union's picket line, the court determined that this type of individual activity was not protected.[36]

In decisions subsequent to the *Illinois Bell* case, the Second, Fifth and District of Columbia Circuits all have recognized the rights of individual workers to honor stranger union picket lines, though the nature and strength of the right has been described differently by the various courts and by the Board. The year after the *Illinois Bell* decision, the Second Circuit, in *NLRB v. Rockaway News Supply Co.*,[37] considered the issue in light of the new 1947 Taft-Hartley amendments. In *Rockaway*, a chauffeur/routeman employee was discharged for refusing to do his normal daily newspaper pickup at a plant where a union, other than his own union, was picketing.[38] The Board indicated that it viewed the employee as an individual "sympathy striker" and implied that he should be treated by his employer as any other economic striker would be treated.[39]

The Second Circuit did not agree with the Board's analysis in *Rockaway*, but the court did make a strong statement in recognition of the right. The court stated:

> Such refusal to cross a picket line is habitual with union workers . . . , it is frequently of assistance to the labor organization whose picket line is respected, and it is in a broad but very real sense directed to mutual aid or protection.[40]

The Rockaway court, however, provided that this right is not an unlimited one,[41] and drawing from the Supreme Court's language in *Republic Aviation Corp. v. NLRB*,[42] the Second Circuit Court of Appeals created a balancing test. Under this test, the employee's right to respect a stranger union picket line is recognized, but if the employer's right to manage his business enterprise is interfered with in the process, the employee's rights will be balanced against the employer's rights under the facts of each case.[43] Applying this balancing

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[34] *Id.*

[35] *Id.* at 127, 28 L.R.R.M. 2081.

[36] *Id.* at 128-29, 28 L.R.R.M. 2081-83.

[37] 197 F.2d 111, 30 L.R.R.M. 2119 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953).

[38] *Id.* at 112, 30 L.R.R.M. at 2120.

[39] Rockaway News Supply Co., 95 N.L.R.B. 336, 337, 28 L.R.R.M. 1314, 1315-16 (1951).

[40] *Id.* at 113, 30 L.R.R.M. at 2121.

[41] *Id.*

[42] 324 U.S. 793 (1947). The Court stated, "[l]ike so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Id.* at 798.

[43] 197 F.2d at 113-14, 30 L.R.R.M. 2121-22.

theory to the facts of *Rockaway*, the court concluded that the employer's interest outweighed the employee's right, and that given the position of the employer in this case, he could discharge the employee for not completing his work, after the employee had been given the choice either to complete his work or be fired.[44]

The Fifth Circuit decision in *NLRB v. Alamo Express, Inc.*[45] represents the second of three circuit court decisions cited by the *Carroll* court which favors the employee's right to respect stranger union picket lines. The *Alamo Express* case represents the Fifth Circuit's acceptance of the Board's balancing approach. In *Alamo Express*, it was the employees' job to pick up merchandise at a plant where a group of employees were picketing. Two employees refused to complete their pick-up assignments, due to their recognition of the picket line, and they were fired.[46] The Board ordered reinstatement of the employees,[47] and the Fifth Circuit affirmed the Board's decision, first by stating its position of deferring to the Board's fact-finding process. The court stated, "[I]t is within the province of the Board to make the initial determination as to the motivation of the employer's act of discharging its employees."[48] The court then considered whether, given the facts as the Board found them, the employer was justified in discharging the employee. As a result of its analysis, the court affirmed the outcome of the Board's application of the standard to the facts of the case and enforced the Board's order to reinstate the discharged employees.[49]

The Court of Appeals for the District of Columbia has concurred with the Second and Fifth Circuits' recognition of the section 7 right in several cases.[50] Moreover, the District of Columbia court generally adheres to the Board's application of its balancing test. In each of three decisions reached between 1964 and 1970—*Teamsters Local Union 675*, *Overnight Transportation Co.*, and *Redwing Carriers*[51]—the District of Columbia Circuit court looked to

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[44] *Id.* at 115, 30 L.R.R.M. at 2122-23. The Supreme Court affirmed the circuit court's decision, NLRB v. Rockaway News Supply Co., Inc., 345 U.S. 71 (1953), but refused to reach the issue whether the employee's activity was protected under section 7. *Id.* at 79. Instead, the Supreme Court based its affirmation on the contract between the two parties, which included a no-strike clause. *Id.* The majority of the Court agreed with the court of appeals' criticism of the Board's "economic striker status" theory. *Id.* at 75. As the Court noted, the Board's approach, in many situations, could afford the replaced employee with a theoretical right, but with no job. In response to this criticism, the Board has since refined its approach, and joined the courts in attempting to find the proper balancing standard to apply to the facts of each case. *See, e.g.*, Redwing Carriers, Inc., 137 N.L.R.B. 1545, 50 L.R.R.M. 1440 (1962), *aff'd sub nom.* Teamsters Local 79 v. NLRB, 325 F.2d 1011, 54 L.R.R.M. 2707 (D.C. Cir. 1963).

[45] 430 F.2d 1032, 74 L.R.R.M. 2742 (5th Cir. 1970).

[46] *Id.* at 1035-36, 74 L.R.R.M. at 2744-45.

[47] *Id.* at 1035, 74 L.R.R.M. at 2744.

[48] *Id.*

[49] *Id.* at 1036, 74 L.R.R.M. at 2745.

[50] *See, e.g.*, Teamsters Local 657 v. NLRB, 429 F.2d 204, 75 L.R.R.M. 2480 (D.C. Cir. 1970) (per curiam); Truck Drivers Local 728 v. NLRB, 364 F.2d 682, 62 L.R.R.M. 2503 (D.C. Cir. 1966) (per curiam); Teamsters Local 79 v. NLRB, 325 F.2d 1011, 54 L.R.R.M. 2707 (D.C. Cir. 1963).

[51] *Id.*

find whether the Board had reached a reasonable decision on the issue of whether the employer had discharged the employee to continue business operations, or to punish the employee for asserting his section 7 right to honor a picket line. In each case, this court, like the Fifth Circuit court, deferred to the Board's judgment, and enforced the Board's order of reinstatement of the employee or dismissal of the complaint.[52] It is apparent, therefore, that where the Board has reached its conclusion from a careful balancing of the employee and employer interests, the District of Columbia Court will enforce the Board's decision.

In summary, all of the circuit courts cited, except the Seventh Circuit, agree that honoring a picket line of another union at another employer's plant is an employee's section 7 right. It is also true, however, that all of the courts noted agree that the employer has rights, though not absolute rights, to manage his business, and that within some factual situations, this right might override the employee's section 7 interests. The major disagreement arises over the issue of establishing a proper standard for balancing the interests of employer and employees. Who should bear the burden of proof? What amount and weight of evidence are required to show a violation, or to defend against a violation?

The Board, following the lead of the Second Circuit, balances the employee's right to respect a stranger union's picket line, and the employers' right to manage his business enterprise. The Board presumes that an employee is protected by section 7 in honoring a stranger union's picket line. The employer has the burden of rebutting that presumption by demonstrating that the discharge or discipline was motivated by a valid business reason. The First Circuit in *Carroll* reversed this allocation of the burden of proof. Once an employer offers a legitimate business reason for the discharge, the Board has the burden of rebutting the presumption of legitimacy by demonstrating a discriminatory motive or anti-union animus.

Although the First Circuit stated that "a case-by-case balancing of the right of the employee to express his union sympathies and the right of the employer to conduct his business"[53] is required, the allocation of the burden of proof created by the First Circuit clearly loads the balance in the employer's favor. Despite the court's claim that in deciding the instant case it need not determine whether the employee's action was protected under section 7, the test used by the court makes it very difficult for the Board to show an unfair labor practice. Thus, the First Circuit's test is inconsistent with the policy of the Board, and the Second, Fifth, Eighth and District of Columbia Circuits.

Unless or until the Supreme Court decides to review the issue,[54] the Board's decisions on this issue will stand a good chance of survival in the circuits where the Board's standards and judgment are favored. It is appar-

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[52] 429 F.2d at 205, 75 L.R.R.M. at 2480; 364 F.2d at 684, 62 L.R.R.M. at 2503-04; 325 F.2d at 1012, 54 L.R.R.M. at 2708.

[53] 578 F.2d at 3, 98 L.R.R.M. at 2849.

[54] In its 1953 case on the issue, NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953), the Supreme Court refused to take a definite stand and fell back on the collective bargaining agreement for a resolution of the dispute.

ent, however, that Board decisions on this issue will face a strong probability of reversal in the First Circuit. It remains to be seen whether the First Circuit will apply the same pro-employer standard where an employee honors a picket line staged against his own employer.

5. *Scope of Bargaining:* Bartlett-Collins

Employers and unions are required to bargain collectively regarding wages, hours and other terms and conditions of employment.[1] Since a refusal to bargain concerning wages, hours and other terms and conditions of employment is an unfair labor practice, these topics are classified as mandatory bargaining subjects. Bargaining subjects not within wages, hours or other terms and conditions of employment are either permissive or illegal.[2] Either party may, without violating its duty to bargain, condition further negotiations, or bargain to impasse over a *mandatory* bargaining subject.[3] Bargaining to impasse, or conditioning further negotiations on the resolution of a *permissive* bargaining subject, on the other hand, is an unfair labor practice;[4] mandatory subjects cannot be held hostage by insistence on a permissive subject.[5] A national policy of encouraging the resolution of labor disputes through collective bargaining lies behind this interpretation of the duty to bargain collectively.

In applying these rules the NLRB previously had determined that an employer's insistence on the presence of a court reporter at bargaining sessions was not an unfair labor practice.[6] The Board, in effect, treated the presence of the reporter as a mandatory subject of bargaining.[7] During the

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[1] 29 U.S.C. § 158(a)(5), (d) (1976). Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." *Id.* § 158(a)(5). Section 8(d) defines collective bargaining as conferring "in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." *Id.* § 158(d).

[2] 29 U.S.C. § 159(a) (1976).

[3] In NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958), the Supreme Court stated, "[t]he duty is limited to those [mandatory] subjects, and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Id.* at 349 (citation omitted).

[4] *Id.*

[5] *Id.* In *Borg-Warner* the Court noted that "good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *Id.* at 349.

[6] Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 29 L.R.R.M. 1608 (1951), *enf'd on other grounds*, 205 F.2d 131, 32 L.R.R.M. 225 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

[7] Bartlett-Collins Co., 237 N.L.R.B. No. 106 (Aug. 23, 1978), 99 L.R.R.M. 1034, 1035. In St. Louis Typographical Union No. 8, 149 N.L.R.B. 750, 57 L.R.R.M. 1370 (1964), the Board rejected the argument that the presence of a stenographer was a preliminary issue outside of the duty to bargain. The Board stated: "It is wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods of compromise

Survey year, the Board in *Bartlett-Collins Co.*,[8] re-examined its earlier policy and determined that the presence of a court reporter is a non-mandatory subject of bargaining, therefore an employer's insistence to impasse on this issue is *per se* an unfair labor practice.[9] The Board's decision in *Bartlett-Collins Co.* is significant since it eliminates an obstacle to mandatory bargaining and forecloses an important area for potential abuse of bargaining duty.

The company previously had been found to have failed to bargain in good faith, violating section 8(a)(5).[10] The company repeatedly had made proposals which, the administrative law judge determined, could not be accepted by the Union.[11] In making his decision, that the employer had violated the obligation to bargain in good faith, the administrative law judge relied primarily on the testimony of a Union witness.[12] After this decision Union representatives requested that the employer resume bargaining.[13] The employer proposed that when negotiations resumed a court reporter be present at all bargaining sessions.[14] The Union opposed the presence of the reporter, but proposed as a compromise that each party be permitted to record the session, transcribing it at a later time.[15] The employer refused to accept this compromise, and conditioned any further bargaining on the presence of a court reporter.[16] In response the Union filed another section 8(a)(5) unfair labor practice charge.[17]

In considering the Union's charge, the Board first noted that its prior decisions had not found unfair labor practices where an employer, in the absence of bad faith, conditioned bargaining on the presence of a court re-

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and accommodation as are used in resolving equally difficult differences relating to substantive terms or conditions of employment." *Id.* at 752, 57 L.R.R.M. at 1371.

[8] Bartlett-Collins Co., 237 N.L.R.B. No. 106 (Aug. 23, 1978), 99 L.R.R.M. 1034.

[9] *Id.*, 99 L.R.R.M. at 1035-36.

[10] Bartlett-Collins Co., 230 N.L.R.B. 144, 96 L.R.R.M. 1581 (1977).

[11] 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1034.

[12] *Id.*

[13] *Id.*

[14] *Id.* The employer brought a court reporter to a preliminary bargaining session. The major portion of the session was occupied in arguing over the presence of the reporter. The meeting ended with both parties in conflict over the issue. The employer in a subsequent letter to the Union stated, "a record of bargaining under the circumstances is both desirable and necessary to establish without resort to credibility determinations what was said or done by the parties in bargaining." *Id.*, 99 L.R.R.M. at 1035.

[15] *Id.* The Union response to the Company proposal "expressed the hope that the litigation between the parties had been concluded; that a mutually satisfactory agreement could now be reached; and that Respondent's concern over potential credibility resolutions and further Board proceedings should not present an issue as far as future bargaining sessions were concerned." Failing this hope that the employer should not be concerned with preserving an accurate record of the bargaining, the Union proposed the compromise of electronic recording. *Id.*

[16] The employer's counsel responded to the Union proposal by rejecting the compromise and stating that the employer "remained available for bargaining, provided that a record of the negotiations would be prepared by a certified court reporter." *Id.*

[17] *Id.*

porter. In these earlier cases the Board first considered the surrounding circumstances to determine whether the employer's condition was made in bad faith, to subvert the bargaining process. If the circumstances did not support a finding of bad faith, the employer's refusal to bargain was not held to violate the Act.[18]

The Board then reevaluated this prior policy in light of the Supreme Court's decision in *NLRB v. Wooster Division of Borg-Warner Corp.*[19] The Board noted that the Supreme Court in *Borg-Warner* interpreted section 8(a)(5) as prohibiting bargaining to impasse upon *any* permissive subject of bargaining.[20] The duty to bargain applied to unions and employers, and was not mitigated by a good faith belief that the subject was a mandatory bargaining matter. The Board noted the strong stand taken by the Supreme Court and determined that, upon re-examination, its prior practice of treating the issue of a court reporter's presence as a mandatory subject of bargaining was an erroneous interpretation.[21] The Board concluded, therefore, that the employer's insistence to impasse on this non-mandatory subject constituted an unfair labor practice, violating sections 8(a)(5) and 8(a)(1) of the Act.[22]

This change in policy appears to reflect a proper interpretation by the Board of the bargaining provisions. It cannot be said that the issue of a court reporter's presence at a bargaining session is really a matter included in "wages, hours, and other terms and conditions of employment."[23] This issue is more appropriately considered a procedural concern, affecting only the negotiations themselves. The matter is, as the Board characterized it, "a threshold matter, preliminary and subordinate to substantive negotiations. . . ."[24]

As well as being conceptually accurate, the decision also reflects the Board's policy of encouraging bargaining. Neither the employer nor the union may use the issue of a court reporter's presence to stall negotiations, regardless of motivation or of good faith intent.[25] Whereas in the past a union or employer bore the heavy burden of demonstrating bad faith in attempting to compel the opposing party to continue or commence bargaining, a union or employer can now rely on the Board's *per se* rule to overcome the court reporter demands. By establishing this *per se* rule, the Board has eliminated an obstacle to bargaining, and has closed off an area for potentially great abuse.

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[18] *Id.*, 99 L.R.R.M. at 1035. *See also* NLRB v. American Ship Bldg. Co., 26 N.L.R.B. 788, 94 L.R.R.M. 1422 (1976), *enf'd in unpublished order*, No. 17-1178 (D.C. Cir. April 5, 1978).

[19] 356 U.S. 342 (1958).

[20] 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1036. *See Borg-Warner*, 356 U.S. at 349. See also note 3 *supra*.

[21] 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1036.

[22] *Id.*

[23] 29 U.S.C. § 158(d) (1976). See note 1 *supra*.

[24] 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1036.

[25] The Board stated, "[h]aving found that the subject matter here involved is not a mandatory subject of bargaining, and that Respondent's insistence on such subject therefore violated Section 8(a)(5), it is irrelevant whether Respondent's insistence was in good or bad faith." *Id.*

The employer in *Bartlett-Collins Co.*, however, argued that this change in Board policy will handicap efforts to determine, during subsequent hearings, the course of negotiation breakdowns. Without the presence of a reporter during bargaining sessions, the Company argued, no assurances of accurate reporting would exist for a court or other body examining the bargaining process[26] later. Although this policy may hinder accurate decision making at possible future review, the Board's decision places a premium on effective bargaining conditions.

The Union argued, and the Board noted in its decision, that the presence of a court reporter at bargaining sessions will often inhibit real progress.[27] Negotiators may concentrate on what they are saying and on the recording process, lessening concern with reaching an agreement. By refusing to permit either party to insist upon the presence of court reporters during negotiations, the Board foregoes a certain measure of accurate reporting in order to maintain an atmosphere conducive to effective bargaining.

In addition, it is not yet certain that the difficulties envisioned by the employer in *Bartlett-Collins* will materialize. The parties still may compromise on this matter and take measures that, to a greater or lesser degree, will ensure accuracy in recording the events at the bargaining sessions. For example, the parties may agree to permit, as in the instant case, an electronic recording of the session. This method may be found not to interfere substantially with open discussion in the sessions since it is a much less blatant form of reporting the dialogue. The recording also can provide a fairly accurate report of what took place.

It remains to be seen what compromises may be worked out to ensure both effective bargaining and an acceptable measure of accuracy in reporting the sessions. It is clear, however, that the Board's new policy contained in the present decision properly characterizes the nature of the issue as a preliminary, nonmandatory matter, and furthers the Act's policy of encouraging collective bargaining.

IV. Municipal Boycott of Non-Union Company: *J.P. Stevens v. Jackson*

During the 1978-79 *Survey* year, the United States District Court for the Northern District of Georgia heard an unusual labor-related case involving J.P. Stevens & Co., the Southern textile manufacturer.[1] The company, ap-

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[26] *Id.*, 99 L.R.R.M. at 1035.

[27] *Id.* at 1035-36. The Board referred to a work by Walter Maggiolo in which he states, "[e]xperience has taught that the presence of a stenographer or tape recorder does inhibit free collective bargaining. Both sides talk for the record and not for the purpose of advancing negotiations toward eventual settlement. Each becomes overconscious of the recording of his remarks. The ease of expression so necessary to proper exposition of problems is hampered. The discussion generally becomes stultified." W. Maggiolo, Techniques of Mediation in Labor Disputes, Oceana Publications, Dobbs Ferry, New York, (1971).

[1] J.P. Stevens & Co. v. Jackson, ___ F. Supp. ___, 99 L.R.R.M. 2827 (N.D. Ga. 1978).

pearing as plaintiff, alleged violations of its constitutional rights by a union and by the mayor of Atlanta, Georgia—allegations quite different from those normally brought by an employer against a union for infringement of Board-administered statutory laws.[2] Stevens alleged that an Executive Order issued by the mayor, forbidding the city of Atlanta from contracting with Stevens until the company ceased discriminatory and illegal practices, violated the company's due process[3] and equal protection[4] rights. Stevens also alleged that the Amalgamated Clothing and Textile Workers Union, the union representing Stevens' employees, was guilty of conspiracy to deny the company of its constitutional rights by lobbying with the city to support the union's labor demands against the company.[5] The district court rejected each of Stevens' contentions, finding no violation of the company's constitutional rights and dismissed the case with award costs to the defendants.[6]

Labor disputes between J.P. Stevens and its employees have a long history. Since the mid-1960's, the J.P. Stevens Company has been involved in continual litigation, in which the company's labor practices have been challenged successfully.[7] More recently, the company has been found liable for

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[2] Of course, in routine labor law cases, only the National Labor Relations Board, and sometimes the federal appellate courts, have the opportunity to hear union versus employer disputes which involve requests for declaratory and injunctive relief. A district court, less frequently, will hear requests for injunctions against unions under 29 U.S.C. § 107 (1976) (section 7 of the Norris-LaGuardia Act), and breach of contract claims under 29 U.S.C. § 185 (1976) (section 301 of the Labor Management Relations Act), and claims for compensatory damages under 29 U.S.C. § 187 (1976) (section 303 of the Labor Management Relations Act). Otherwise, it is not the usual course for a federal district court to become involved with actions arising out of labor disputes. Thus, this case is unique from the beginning, by virtue of the fact that it is an employer suit against a union, where the employer is attempting to defeat the union's boycotting activities, by filing charges in a district court.

[3] 99 L.R.R.M. 2827, 2829, 2830-33.

[4] *Id.* at 2829, 2833-34.

[5] *Id.* at 2829, 2834-37.

[6] *Id.* at 2837.

[7] The *J.P. Stevens* court summarized the company's history of litigation before the Board and the courts as follows:

> The following provides a summary of plaintiff's adverse history before the NLRB and appellate courts: J.P. Stevens & Co. (Stevens I), 157 NLRB 869, 61 LRRM 1437, enf'd. with modification, 380 F.2d 292, 65 LRRM 2829 (2d Cir.), cert. denied, 389 U.S. 1005, 66 LRRM 2728 (1967); J.P. Stevens & Co. (Stevens II), 163 NLRB 217, 64 LRRM 1289, enf'd. with modifications, 388 F.2d 896, 67 LRRM 2055 (2nd Cir. 1967), cert. denied, 393 U.S. 836, 69 LRRM 2435 (1968); J.P. Stevens & Co. (Stevens III), 167 NLRB 266, 66 LRRM 1024, enf'd. with modifications, 406 F.2d 1017, 70 LRRM 2104 (4th Cir. 1968); J.P. Stevens & Co., (Stevens IV), 167 NLRB 258, 66 LRRM 1030, enf'd. with modifications, 406 F.2d 1017, 70 LRRM 2104 (4th Cir. 1968); J.P. Stevens & Co. (Dublin-Nathaniel Plants) (Stevens V), 171 NLRB 1202, 69 LRRM 1088, enf'd. 417 F.2d 533, 72 LRRM 2433 (5th Cir. 1969); J.P. Stevens & Co. (Gulistan Division) (Stevens VII), 179 NLRB 254, 75 LRRM 1375, enf'd., 441 F.2d 514, 76 LRRM 2817 (5th Cir.), cert. denied, 404 U.S. 830, 78 LRRM 2464 (1971); J.P. Stevens & Co. (Stevens IX), 183 NLRB 25, 75 LRRM 1407 (1970), enf'd., 461 F.2d 490, 80 LRRM 2609 (4th Cir. 1972); The Black Hawk Corp. (Stevens X), 183 NLRB 267, 74 LRRM 1277 (1970); J.P. Stevens & Co. (Gulistan Division) (Stevens XI),

engaging in discriminatory hiring practices, violations under Title VII of the Civil Rights Act of 1964.[8] Finally, the company has been found in contempt of orders to remedy its unfair labor practices.[9]

In the instant case, the mayor of the City of Atlanta, Maynard H. Jackson, issued an Executive Order which described the J.P. Stevens Company as "an historic and continuing violator of the federal labor laws"[10] and equal employment laws. In reaction to the company's practices, the order stated:

> [I]t is not in the best economic business and social interests of the City of Atlanta and its citizens to support financially organizations which deny fundamental human and employment rights to employees and applicants for employment, nor to contract with organizations which support such illegal, discriminatory activities.[11]

Based on this rationale, the Order provided that the City of Atlanta would boycott J.P. Stevens by refusing to contract with the company until it discontinued its illegal and discriminatory employment practices. The Order also called for a boycott of all companies which were "first tier" contractors with J.P. Stevens.[12] Three days after the Order was issued, the company sought a

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186 NLRB 180, 75 LRRM 1393 (1970), enf'd., 455 F.2d 607, 78 LRRM 3116 (5th Cir. 1971); J.P. Stevens & Co., Inc. (Stevens XII), 190 NLRB 751, 77 LRRM 1333 (1971), remanded on other grounds, 475 F.2d 973, 82 LRRM 2471 (D.C. Cir. 1973), on remand, 205 NLRB 1032, 84 LRRM 1092 (1973); NLRB v. J.P. Stevens & Co. (Stevens XIII), 464 F.2d 1326, 80 LRRM 3126 (2d Cir. 1972), cert. denied, 410 U.S. 926, 82 LRRM 2597 (1973) (on contempt), remedial order at 81 LRRM 2285; J.P. Stevens & Co. (Stevens XIV), 217 NLRB 90, 89 LRRM 1729 (1975), enf'd., 547 F.2d 792, 93 LRRM 2262 (4th Cir. 1976); J.P. Stevens & Co. (Stevens XV), 219 NLRB 850, 89 LRRM 1814, enf'd., 547 F.2d 792, 93 LRRM 2262 (4th Cir. 1976); J.P. Stevens & Co. (Stevens XVI), 220 NLRB 34, 90 LRRM 1215 (1975); NLRB v. J.P. Stevens & Co. (Stevens XVII), 538 F.2d 1152, 93 LRRM 2265 (5th Cir. 1976) (on contempt); NLRB v. J.P. Stevens & Co. (Stevens XVIII), 563 F.2d 8, 96 LRRM 2150 (2d Cir. 1977) (on contempt). *Id.* at 2828 n.2.

[8] 42 U.S.C. § 2000e (1976). The *J.P. Stevens* court also listed the company's previous Title VII cases:

> Plaintiff's recent history of adverse Title VII, Equal Employment Act, 42 U.S.C. § 2000e, et seq., decisions include: Sherrill v. J.P. Stevens & Co., 410 F. Supp. 770 (W.D.N.C. 1975), aff'd No. 76-1064 (4th Cir. Jan. 24, 1977) (unpublished); Sledge (Harrison) v. J.P. Stevens & Co., 10 Empl. Prac. Dec. ¶10,585 and 12 Empl. Prac. Dec. ¶¶11,248 and 11,047, 16 FEP Cas. 1652 (E.D.N.C. 1976), stayed pending appeal, 12 Empl. Prac. Dec. ¶11,252, 18 FEP Cas. 260 (4th Cir. 1976).

99 L.R.R.M. at 2829 n.2.

[9] See contempt cases cited in n.7 *supra* (*Stevens* XIII, *Stevens* XVII and *Stevens* XVIII).

[10] 99 L.R.R.M. at 2828.

[11] *Id.* at 2829.

[12] The pertinent part of the order provided that:

> effective immediately, the City of Atlanta shall not enter into any contracts for the purchase of goods or services nor in any other manner contract with or do business with the J.P. Stevens Company, nor any other company with whom J.P. Stevens is a first-tier contractor which directly or indirectly supports the illegal, discriminatory policies and practices of the J.P. Stevens

temporary restraining order.[13] At the hearing on the company's motion, the Mayor agreed to suspend implementation of the Executive Order until the plaintiff's request for permanent injunctive relief was heard and decided upon. Two days later the Mayor publicly withdrew the Executive Order.[14]

Originally, the plaintiff's complaint sought declaratory and injunctive relief under sections 1983[15] and 1985(3),[16] of Title 42. After the withdrawal of the Order by the Mayor, the plaintiff amended its complaint to request declaratory relief and nominal and punitive damages under section 1983 alone.[17] First, the plaintiff claimed that under section 1983 of the Civil

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> Company . . . until and unless the J.P. Stevens Company and such of those companies with whom they do contract cease and desist from such *discriminatory* and *illegal* practices.

Id. at 2829 (emphasis in original).

[13] *Id.*

[14] *Id.* It was undisputed in the instant case that during the three days the order was in effect, "neither plaintiff nor any of its first-tier contractors tendered any bid on a city contract, was refused any contract, or suffered any cancellation of an existing business agreement." *Id.*

[15] 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[16] 42 U.S.C. § 1985(3) (1976) provides in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[17] 99 L.R.R.M. at 2829. The fact that a governmental defendant was involved in the suit limited the company's range of possible approaches. The mayor of Atlanta is not subject to any N.L.R.A. or L.M.R.A. prohibitions. Otherwise, possible actions against the union could have included a claim before the Board based on § 8(b)(4) of the N.L.R.A., 29 U.S.C. § 158(b)(4) (1976), or a claim for damages under section 303 of the L.M.R.A., 29 U.S.C. § 187 (1976). However, the § 303 claim would have served a limited purpose since punitive damages are not collectible under § 303. *See* Local 20, Teamsters v. Morton, 377 U.S. 252, 260 (1964). On the § 8(b)(4) unfair practices issue, perhaps the company thought the court would consider its arguments more favorably than would the Board, which undoubtedly is weary of dealing with repeated offenses under the Act by J.P. Stevens. Also, by joining the two defendants in the same suit, the company could better stress to the court the unfair, "conspiring" nature of this scheme.

Rights Act, the Mayor's Order could be challenged in federal court as a violation of the company's due process rights.[18] The company's due process allegations developed along two theories: 1) that the Mayor's allegedly false statements had damaged the company's business reputation,[19] and 2) that the Mayor had deprived the company of its right to pursue a lawful business without prior notice and hearing.[20]

In considering the first due process allegation—the damage to business reputation theory—the court considered a 1976 Supreme Court decision, *Paul v. Davis*.[21] In that case, the Supreme Court required the plaintiff to show that it had suffered both "the stigma associated with false governmental accusations" *and* "some significant resultant alteration of legal status" to establish a cognizable section 1983 claim based on loss of business reputation.[22] Applying the *Paul v. Davis* test to the present case, the court found that, although the company showed the Mayor's Order had misstated some details as to charges against J.P. Stevens under Title VII employment discrimination laws, and had made the company appear more culpable than had been proven, it was doubtful that "one imprecise statement, in the long public list of labor and employment violations chronicled in the Executive Order, would lead a jury to find that the level of substantial falsehood demanded in the first test had been met."[23] Second, the company did not meet the latter part of the *Paul v. Davis* test. It did not allege or substantiate any tangible change in its legal status caused by the Executive Order.[24] Thus, due to plaintiff's failure to meet the *Paul v. Davis* test, the court dismissed the plaintiff's due process claim based on damage to business reputation.

The plaintiff's second due process theory was based on an allegation that the Mayor's act had deprived the company of its right to pursue a lawful business without prior notice or hearing.[25] Under this section 1983 allegation, the plaintiff must show 1) an entitlement to some interest in property or liberty, and 2) a summary deprivation of that entitlement.[26] If it is found that the plaintiff has no "entitlement" to city contracts, the government can place conditions on receipt of contracts provided, such conditions are "reasonable."[27] The plaintiff attempted to base an alleged entitlement to city

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[18] *Id.* at 2830-33. 42 U.S.C. § 1983 (1976), (quoted at note 15 *supra*), was the substantive basis for the company's claim. Under § 1983, the plaintiff is entitled to bring a suit for damages and equitable relief against a governmental agent who has allegedly violated the plaintiff's constitutional rights.

[19] 99 L.R.R.M. at 2830-31.

[20] *Id.* at 2831-33.

[21] 424 U.S. 693 (1976).

[22] 99 L.R.R.M. at 2830 (citing Paul v. Davis, 424 U.S. 693, 708-09 (1976)).

[23] *Id.* at 2831. Thus, plaintiff's burden under a due process claim is greater than in a common law defamation action. *Id.* at 2830. *See* Paul v. Davis, 424 U.S. at 701-10.

[24] 99 L.R.R.M. at 2831.

[25] *Id.*

[26] *Id. Compare* Board of Regents v. Roth, 408 U.S. 564 (1972) (no entitlement), *with* Perry v. Sindermann, 408 U.S. 593 (1972) (plaintiff deprived of an entitlement without due process).

[27] 99 L.R.R.M. at 2833 (*citing* United States ex rel. Laino v. Warden of Walkill Prison, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd per curiam*, 355 F.2d 208 (2d Cir. 1966).

contracts on a Georgia statute, which allowed municipalities to let contracts on a competitive bid basis,[28] and on an Atlanta ordinance, which required the city to make purchases on competitive bids.[29] The court, however, rejected Stevens' argument and concluded that the company here did not establish the necessary showing of entitlement to potential public contracts. The court based its rejection of the plaintiff's argument on two grounds. First, the court stated that neither the statute nor the ordinance created an enforceable right in the bidder, but rather that they were intended to protect the public at large.[30] Second, the court found that public contracting, unlike public employment, repeatedly has been held to lie beyond the bounds of due process protection.[31]

Since the court concluded that no civil right to public contracts existed, therefore the only question remaining with respect to this due process charge was whether the Mayor's Order included a "reasonable" condition precedent to the plaintiff's city contracting.[32] The court found that requiring J.P. Stevens to meet the goals of the city and its taxpayers with respect to compliance with national labor and equal employment laws,[33] as a condition precedent to receiving city contracts, was as rational as the city's already accepted condition precedent that contracts go to the "lowest responsible bidder."[34] As a result, the court dismissed the company's due process claims as "not actionable under section 1983."[35]

The plaintiff's second claim was that Mayor Jackson's Order violated the company's constitutional right to equal protection.[36] The plaintiff alleged that similarly situated potential contractors were not treated similarly, and therefore, that Jackson's Order failed to meet the traditional rational basis test.[37] In rejecting this argument, the court summarized the elements of the rational basis standard.[38] The standard, the court stated, "(1) admits that the government may wield broad discretion in order classifications; (2) presumes such classifications to be valid; and thereby (3) places the heavy burden of proving invalidity upon the challenger."[39] The *J.P. Stevens* court accepted

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[28] GA. CODE §§ 69-409 (1975).

[29] ATLANTA, GA., CODE § 31-41.

[30] 99 L.R.R.M. at 2832. The court cited Perkins v. Lukens Steel Co., 310 U.S. 113, 126 (1940); M.B. Guran Co. v. City of Akron, 546 F.2d 201 (6th Cir. 1976); and MCQUILLIN, MUNICIPAL CORPORATIONS § 29.29 (3d ed. 1969) as precedent and authority for its conclusion that no private cause of action was created by the statute or by the ordinance.

[31] 99 L.R.R.M. at 2832. *See also* Image Carrier Corp. v. Beame, 567 F.2d 1197, 97 L.R.R.M. 2259 (2d Cir. 1977); Ohio Inns, Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) (3 judge), *aff'd without opinion*, 409 U.S. 904 (1972).

[32] 99 L.R.R.M. at 2833.

[33] See text and notes at notes 10-12 *supra*.

[34] 99 L.R.R.M. at 2833.

[35] *Id.*

[36] *Id.* at 2833-34.

[37] *Id.* at 2833. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[38] 99 L.R.R.M. at 2834.

[39] *Id. See* San Antonio School Dist., 411 U.S. 1 (1973); McGowan v. Maryland, 366 U.S. 420, 425-28 (1960).

the justification for the special classification as stated in the Order that J.P. Stevens was singled out because of its record of illegal and discriminatory employment practices and because of the city's interest in discouraging further use of such undesirable practices.[40] Although the plaintiff argued that Jackson had issued the Order with political motives in mind—to advance his own popularity with organized labor[41]—the court followed the rule that *any* reasonable justification will be sufficient to substantiate the classification and found the justification stated in the Order to be substantially "rational."[42] Thus, Jackson's motion for summary judgment on plaintiff's equal protection claim also was granted.[43]

The plaintiff's third allegation brought the Amalgamated Clothing and Textile Workers Union, the union representing plaintiff's workers, into the suit as defendants. The company charged the union with engaging in a conspiracy to deprive the plaintiff of its constitutional rights.[44] Since the company's section 1983 complaint against the Mayor was dismissed on the basis that no infringement of constitutional rights was suffered by the plaintiff, the court concluded that the section 1983 complaint against the union as co-conspirator also must be dismissed.[45] Without a decision against the Mayor, there could be no constitutional conspiracy claim against the union, the state action party being a necessary element.[46]

The court was not satisfied, however, with dismissing the complaint on this reasoning alone. As a basis for further discussion of this issue, the court stated that, in addition to its failure on the basis of an insufficient claim against the Mayor, "the plaintiff's charge against the union threatens First Amendment and federal labor law protections which should not go unnoticed."[47] The allegations behind the company's section 1983 co-conspirator claims against the union were that the union had offered clerical and administrative assistance in drafting the Executive Order, and that the union had given financial support to a non-profit organization, Southerners for Economic Justice, which participated in promoting an ongoing Stevens consumer boycott and which included Mayor Jackson on its Board of Directors.[48] The company alleged that the union and the Southerners for Economic Justice had attempted to persuade Mayor Jackson and other public officials to support the Stevens consumer boycott and that some of those public officials, including Jackson, had publicly voiced their support.[49] Assuming all of the company's allegations to be true, the court found that even if the plaintiff's due process and equal protection claims against the mayor had survived a summary judgment motion, the union would have been released from

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[40] See text and notes at notes 10-12 *supra*.
[41] 99 L.R.R.M. at 2834.
[42] *Id.* *See* McGowan v. Maryland, 366 U.S. 420, 426 (1960).
[43] 99 L.R.R.M. at 2834.
[44] 99 L.R.R.M. at 2834-37.
[45] *Id.* at 2835.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 2836.

the suit because the allegations did not constitute a conspiracy against the company's constitutional rights on the part of the union.[50]

In rejecting the conspiracy claim on this second level, the court emphasized the union's rights in this context and characterized the union's activities as falling under the right of petition. The court explained:

> [A]ll persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.[51]

The court also noted that a broad range of related guarantees—freedom of speech and association—protected all of the alleged union activities.[52]

In addition to the union's constitutional guarantees, the court found protection for the union's alleged activities in the federal labor laws, citing in particular section 20 of the Clayton Act,[53] which prohibits courts from issuing injunctions against peaceful, lawful assembly, boycotting, and other similar activities.[54] All of the alleged union activities, the court concluded, related to advocating and canvassing for a consumer boycott were protected by this section of the statute.[55] Finding no unlawful union action, therefore, the court also granted defendants' third summary judgment request, dismissing the claim against the union.[56]

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[50] *Id.* at 2837.

[51] *Id.* at 2835-2836 (quoting Sierra Club v. Butz, 349 F. Supp. 934, 938 (N.D. Cal. 1972)).

[52] 99 L.R.R.M. at 2836. *See* United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961); Thomas v. Collins, 323 U.S. 516 (1945); U.S. v. Hutcheson, 312 U.S. 219 (1941).

[53] 29 U.S.C. § 52 (1976).

[54] 99 L.R.R.M. at 2836. Section 20 of the Clayton Act, 29 U.S.C. § 52 (1976), provides in pertinent part:

> [No] restraining order or injunction shall prohibit person or persons, whether singly or in concert . . . from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information . . . or from ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute . . . moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

[55] 99 L.R.R.M. at 2836. The court also cited 29 U.S.C. § 104 (Norris-LaGuardia Act); 29 U.S.C. § 157 (N.L.R.A.); 29 U.S.C. § 158(b)(4) (N.L.R.A. as amended by the 1959 Landrum-Griffin amendments). *Id.*

The court noted that the union activities alleged included both a wide range of ongoing consumer boycott schemes and specific aid in drafting the Executive Order, to effect a city-government boycott as well. However, the court did not distinguish the two types of activities, in the context of its discussion of constitutional and statutory protections. The suggestion is that both categories of activity are equally protected.

[56] 99 L.R.R.M. at 2836.

The *J.P. Stevens* decision represents several significant developments, first, in determining the acceptable range of action a local government may take in support of a union-organized consumer boycott, and, second, in determining the wide breadth of union boycott activities which will be protected under constitutional and statutory provisions. First, with regard to the Mayor's role, the court's holding allows and, in effect, encourages a city government's voluntary use of its economic persuasion on industries, to encourage compliance with established federal labor laws and with equal employment standards. The city's use of compliance with federal labor policies as a precondition to receiving government contracts, as imposed by the Executive Order, presents a relatively novel issue. One federal case involving a similar issue was *Image Carrier Corp. v. Beame*.[57] In a 2 to 1 decision in *Image Carrier Corp.* the Court of Appeals for the Second Circuit found that a city policy limiting bid openings for the city's "flat-form" printing contracts to union printers was "rationally related to a legitimate governmental objective" and therefore constitutionally allowable. In its opinion, the Second Circuit majority emphasized the local government's valid role in supporting the policies underlying national labor policies, specifically, in its attempts to foster collective bargaining.[58] The *Image Carrier* court also emphasized the basic premise of limiting judicial review in cases where the court is called upon to scrutinize "economic" legislation.[59]

The *J.P. Stevens* court followed the Second Circuit's reasoning in *Image Carrier Corp.* and extended the Second Circuit's approach in two respects: 1) by finding that a city mayor's executive order, as well as a city's legislative resolution, will survive due process and equal protection scrutiny where the executive act fosters national labor policy, and 2) by finding that such an action by a city may be used to encourage a company's compliance with federal equal employment policy, as well as to encourage national labor law policies under the National Labor Relations Act (N.L.R.A.).[60] Thus, the *J.P. Stevens*

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[57] 567 F.2d 1197, 97 L.R.R.M. 2259 (2d Cir. 1977), *cert. denied*, 99 S. Ct. 1785 (1979). *See also* Ohio Inns, Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

[58] 567 F.2d at 1203.

[59] *Id.* "[I]n economic matters . . . (citations omitted) the courts have not, since the days of the Depression, interfered with legislative judgment rationally related to a legitimate governmental objective." *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); Williams v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955).

[60] In this second respect, the city's action is comparable on a local level to the federal policy effected by Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d (1976). Under Title VI, federal agencies are directed to cut off funds to recipients who discriminate on the basis of race, color, or national origin. In an analogous way, the court in *Stevens v. Jackson* approved a similar local government approach to effecting compliance with equal employment laws. The municipal government in *Stevens v. Jackson* had refused to pass taxpayer funds over to a company which had continuously refused to comply with equal employment policies. The only difference between the Mayor's approach in *Stevens v. Jackson* and the congressional approach under Title VI

decision fosters the approach formulated earlier by the Second Circuit, and, more generally, approves a city government's voluntary attempts to bring about compliance with federal labor and equal employment law on a local level.

It is difficult, however, to determine the future impact of the second significant development of the *J.P. Stevens* decision—the district court's comments regarding the union's protection against a section 1983 claim where the union has encouraged a government boycott against the employer. The only issue properly before the district court, relative to the union's activity, was whether the union was involved with the government in a conspiracy actionable under section 1983. Once the court found that the company had no actionable section 1983 claim against the Mayor, the accompanying conspiracy charge against the union automatically was defeated, the required state action link having been removed.[61] Beyond this point, the court's comments are dicta, unnecessary to the court's decision. The theories advanced by the court regarding the legal protections of the union, however, provide interesting starting points from which courts in later cases may draw.

The significant aspect of the court's pronouncements regarding the constitutional protections applicable to the union activity is that the activities involved interactions between the union and government officials, rather than interaction between outside unions or between other private employers. Implicitly, the court draws an absolute distinction between the two situations: 1) government-union activities, and 2) union-secondary employer activities. Under the National Labor Relations Act, the extent of allowable activity between a union and secondary employers is clearly restricted.[62] An extensive

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is that in the latter case the funding agencies themselves are given power to withdraw or refuse funding after certain inquiries as to the recipient's practices are made according to specific procedural guidelines. 42 U.S.C. § 2000d-1. However, on the municipal decision-making level, as in *Stevens v. Jackson*, presumably the local government may refuse to provide economic benefits to companies only where there have been previous judicial determinations of such companies' non-compliance with federal labor or equal employment laws. *Cf.* Executive Order No. 11246 (Order issued by President Johnson in 1965 requiring that all covered governmental contracts contain a non-discrimination clause, including an agreement to take affirmative action to achieve the equal opportunity goals of the Order. This Order was found to be valid and enforceable in *U.S. v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977)).

[61] 99 L.R.R.M. at 2834-35.

[62] *See* § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1976), prohibiting certain types of union and joint union-employer activity which constitutes secondary boycotting:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to

body of case law has developed around the issue whether union activity of this type falls within the permissible bounds of "primary activities,"[63] or within the prohibited category of secondary boycotting.[64] Significantly, under the facts of *J.P. Stevens,* however, the court avoids this difficult primary versus secondary boycotting problem. The court does not mention the issue and thus assumes that the distinction is not relevant where a union is lobbying or petitioning for governmental action, as opposed to carrying out the activity on its own or conspiring with secondary employers.[65] The difference perceived between the two types of activity is based on the first amendment theory that

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threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) . . . to enter into any agreement which is prohibited by [section 8(e)];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

. . . .

. . . *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employer by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . . .

Section 8(e), 29 U.S.C. § 158(e) (1976), referred to above as a prohibition provision, states that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: . . . .

[63] *See, e.g.*, NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964); NLRB v. Carpenters Council, 398 F.2d 11, 68 L.R.R.M. 2840 (8th Cir. 1965).

[64] *See, e.g.*, Local 140, Furniture Workers v. NLRB, 390 F.2d 495, 67 L.R.R.M. 2392 (2d Cir. 1968); Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952 (D.C. Cir. 1968); Retail Clerks (Land Title Ins. Co.) Local 1001, 226 N.L.R.B. No. 106, 93 L.R.R.M. 1338 (1976); Carpenters Local 550 (Diamond Industries), 227 N.L.R.B. No. 36, 94 L.R.R.M. 1426 (1976). *Cf.* cases interpreting § 8(e) ("hot-cargo" agreements), *e.g.*, National Woodwork Mfrs. Ass'n. v. NLRB, 386 U.S. 612, 64 L.R.R.M. 2801 (1967).

[65] In the latter case, the union's activity would be prohibited, if the union and a secondary [private] employer conspired to boycott a "first-tier" contractor of J.P. Stevens, under § 8(b)(4) and § 8(e) of the N.L.R.A. (quoted at note 62 *supra*).

petitioning the government is an absolute right. A union may petition the government, requesting action that is either consistent with national labor policy or requesting action that runs against national labor policy. In both cases, this court implies, the union activity is protected. Presumably, since the union's "petitioning" activities are absolutely protected, the duty is upon the government to respond to the union in a responsible manner.

In contrast to the court's well-founded comments regarding the constitutional protections available to the union, the court's comments regarding the statutory protection are less appropriate. Whether the union's activity should be considered as a protected activity under federal labor law provisions[66] is a potentially complex issue, particularly in light of the Mayor's inclusion of an across-the-board secondary boycott of first tier contractors with Stevens in his Executive Order.[67] Moreover, interpretation of what is protected activity within the meaning of the National Labor Relations Act normally is to be determined by the Board, in the first instance, and to be reviewed not by the district court, but by a federal circuit court upon appeal. Perhaps for these reasons, the court dealt with the statutory labor law issue summarily, discussing in detail only the anti-injunction intent of section 20 of the Clayton Act.[68] The court correctly stated that under the Clayton Act and section 4 of the Norris-LaGuardia Act,[69] the court lacked jurisdiction to issue an injunction

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[66] The court stated that, beyond the first amendment protections, the union's conduct "falls squarely within the protection afforded labor publicity efforts under federal labor laws." *See* § 20 of the Clayton Act, 29 U.S.C. § 52 (quoted at note 54 *supra*); § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104; §§ 7 and 8(b)(4) of the N.L.R.A., 29 U.S.C. § 157 and 29 U.S.C. § 158(b)(4) (quoted at note 62 *supra*).

[67] See text of the Order at note 12 *supra*.

The N.L.R.A. suggests a policy against secondary boycotts, where non-offending employers are boycotted even though they have not committed unfair labor practices, although the Act does not absolutely prohibit such a boycott when imposed by a governmental unit, since a government employer is not within the scope of regulation under the Act. *See* § 8(b)(4) and § 8(e) of the N.L.R.A. (quoted at note 62 *supra*).

Whether a union's role in initiating the governmental boycott would be protected under the Act is not such an easily determined issue as the court apparently assumes by stating that the union activities here fall "*squarely* within the protection afforded . . . under federal labor laws." 99 L.R.R.M. at 2836 (emphasis added).

[68] 29 U.S.C. § 52 (1976).

[69] 29 U.S.C. § 104 (1976):

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

against the union. If the court had carried through consistently with this approach, it would not have suggested that the union activities were "squarely within the protection" of sections 7 and 8(a)(4) of the N.L.R.A. A more accurate approach would treat the union activities here as outside the reach of the court without further comment.[70] Aside from this relatively minor difficulty, however, the court's overall approach brought a correct result—the union's activities organizing a consumer boycott and seeking the government's support of that boycott clearly would be protected by the first amendment and therefore beyond the reach of a court injunction.

Thus the *J.P. Stevens* decision suggests continued protection under federal law of an organized union's right to speak publicly of its dissatisfaction with an employer who continues to violate federal labor law policies in an ongoing labor dispute. This guarantee includes the right to persuade third parties to join a consumer boycott and the right to lobby and petition the government, in an attempt to persuade public officials to support a union's interests. Second, the case stands for a newer idea, that city governments—as well as the state and federal governments—may use their economic power voluntarily to persuade private companies to operate according to established federal labor law and equal employment standards. Such a decision seems appropriate in the instant case, especially in light of the illegal behavior J.P. Stevens Company has demonstrated after numerous adverse Board and court decisions. The *J.P. Stevens* decision, therefore, strengthens the effectiveness of federal labor law, by permitting a, perhaps, more effective means of inducing compliance.

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the Acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

[70] Whether all of the union's activities in this case are "protected activities" under the Act, and therefore to be given protection by the Board in an unfair labor practice case is a separate question for the Board. Although the union activities, including the alleged drafting of the mayor's order, *appear* to be protected by the Act, that question is one to be properly decided by the Board in the context of a § 8(b)(4) complaint, not by a federal district court in a § 1983 action.

The purpose of creating the Board in 1947 was to give it general primary jurisdiction in the area of labor relations. Thus, the company should not be allowed to circumvent the Board, where it is attempting to quash union activity. If requests to enjoin union activity do not trigger a district court's jurisdiction under § 7 of the Norris-LaGuardia Act, then the court should refuse to consider any equitable action against the union, leaving the company with its appropriate course—filing a complaint with the Board, if, in fact, there is a basis for such complaint.

EMPLOYMENT DISCRIMINATION LAW

I. PROCEDURAL DEVELOPMENTS

A. *Prima Facie Case*

1. *Disparate Impact and Proof of Prima Facie Case:* New York Transit Authority v. Beazer

In *Griggs v. Duke Power Co.*,[1] the United States Supreme Court determined that victims of employment discrimination who bring suits under Title VII of the Civil Rights Act of 1964[2] need not prove discriminatory intent.[3] Instead, such plaintiffs must demonstrate only that the hiring criteria in question "select applicants for hire in a significantly discriminatory pattern."[4] Once a prima facie case is established, the employer may defend his practice by showing that it bears "a manifest relation to the employment in question."[5] Finally, if an employer has met the burden of showing a "business necessity," the plaintiff may nevertheless demonstrate that the requirement, although facially neutral, is merely a pretext for discrimination.[6]

Although the *Griggs* Court provided a general outline of the disparate impact cause of action, it did not specify either the nature or the amount of statistical evidence necessary to support a prima facie case. In addition, it failed to adequately define the burden borne by a defendant in rebutting the plaintiff's evidence or in demonstrating a business necessity. Several more recent Supreme Court decisions have further defined the plaintiff's and defendant's respective burdens to present evidence and to prove their claims.[7] However, *New York Transit Authority v. Beazer*,[8] decided during the *Survey* year, introduced new uncertainties into this area.

Beazer was a class action challenging a New York City Transit Authority[9] policy which prohibited the employment of any person found to be using methadone.[10] The four named plaintiffs challenged this policy on two

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[1] 401 U.S. 424 (1971).

[2] 42 U.S.C. 2000(e) *et seq.* (1976).

[3] 401 U.S. at 430. *See* Washington v. Davis, 426 U.S. 229, 239-40 (1976) (proof of discriminatory intent is required to establish a violation of the equal protection component of fifth amendment due process).

[4] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[5] Griggs v. Duke Power Co., 410 U.S. 424, 432 (1971). *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[6] Dothard v. Rawlinson, 433 U.S. at 329; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[7] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (the proper use of statistics in disparate impact cases); Teamsters v. United States, 431 U.S. 324 (1977) (the proper use of statistics in disparate treatment cases); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (defendant's burden of proof in disparate impact cases).

[8] 440 U.S. 569 (1979).

[9] Hereinafter referred to as Transit Authority, or T.A.

[10] Rule 11(b) of the Transit Authority Rules and Regulations embraces a general policy prohibiting the use of narcotic drugs.

> Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except

grounds. First, they argued that a classification based on methadone use violates the due process and equal protection clauses of the fourteenth amendment.[11] Second, claiming that a disproportionate number of methadone users in New York City are Blacks and Hispanics, plaintiffs argued that the Transit Authority's exclusionary policy has a disparate impact on Blacks and Hispanics in violation of Title VII.[12]

In its initial opinion, the district court addressed only the constitutional claim.[13] After extensive testimony concerning the physical and psychological effects of methadone use, and the nature of the jobs affected,[14] the court concluded that the Transit Authority's exclusionary policy violates the equal protection clause.[15] The court, however, expressly limited relief to those members of the class who had been maintained satisfactorily in a methadone program for at least a year and who were seeking only non-safety-sensitive jobs.[16] In a supplemental opinion, the district court judge found that the Transit Authority's exclusionary employment policy also violated Title VII.[17] Since the unconstitutionality of this policy had already been established, the statutory question was considered merely to establish the availability of attorney's fees.[18] Consequently, the district court gave only superficial consideration to the Title VII issue.

On appeal, the Second Circuit affirmed that part of the district court's opinion which related to the class, but reversed the court's denial of individual relief to three of the four named plaintiffs.[19] The circuit court based its opinion solely on the equal protection claim,[20] but affirmed the award of at-

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with the written permission of the medical director-Chief Surgeon of the system.

440 U.S. at 572. Although this rule does not explicitly cover methadone, and although it appears to allow the possibility of waiver, the parties in *Beazer* stipulated that methadone was considered by the T.A. to be a narcotic drug and that no written permission was ever given by the chief surgeon for the employment of any person using methadone. 440 U.S. at 572 n.3.

[11] Beazer v. New York City Transit Authority, 399 F. Supp. 1032, 1033 (S.D.N.Y. 1975).

[12] *Id.*

[13] *Id.* at 1058-59. Justice Stevens' majority opinion in the Supreme Court chastised the district court for apparently deviating from the accepted policy of resolving all statutory issues first in order to avoid constitutional issues. 440 U.S. at 582-83; *see, e.g.*, Spector Motor Corp. v. McLaughlin, 323 U.S. 101, 105 (1944).

[14] 399 F. Supp. at 1037.

[15] *Id.* at 1058.

[16] *Id.* The Transit Authority employs approximately 47,000 people. Of these, 12,300 are employed in operating positions which have a direct impact on public safety. These positions include subway operators, conductors, bus drivers and subway tower men. *Id.* at 1052-53. In addition, certain other job titles are classified as "critical" by the N.Y.C. Transit Authority on the basis of the risks which they present to the public, or to other employees. *Id.* at 1053-54.

[17] Beazer v. New York City Transit Authority, 414 F. Supp. 277, 278-79, 15 FEP Cas. 1605, 1606 (S.D.N.Y. 1976).

[18] *Id.* at 278, 15 FEP Cas. at 1605.

[19] Beazer v. New York City Transit Authority, 558 F.2d 97, 100-01, 17 FEP Cas. 226, 229 (2d Cir. 1977).

[20] *Id.*, 17 FEP Cas. at 227.

torney's fees on the basis of the Civil Rights Attorney's Fees Awards Act of 1976.[21] As a result, the circuit court never considered the Title VII claim.[22]

The Supreme Court, in a six to three decision, reversed the judgment of the Second Circuit and held that *all* methadone users can be banned from any employment with the Transit Authority.[23] Although the district court had given only fleeting consideration to the plaintiff's Title VII challenge and the Second Circuit had not even considered the question, the Supreme Court decided that it was appropriate nonetheless to resolve the issue.[24] In doing so, the Court first focused on the strength of the plaintiffs' prima facie case. Although the majority was unwilling to overturn the district court's conclusion that a prima facie case of disparate impact had been established, the Court questioned the strength of the evidence on which this conclusion was based.[25]

The statistical evidence considered by the district court was of two sorts. The first included a breakdown by race of Transit Authority workers who had been referred to the medical director for suspected violations of the company drug policy since July 1972.[26] In its supplemental opinion, the district court had noted that 81 percent of suspected violaters were Black or Hispanic.[27] The Supreme Court, however, questioned the relevance of this statistic. The Court first noted that the data was deficient because it included all suspected drug users, not just methadone patients. Second, the statistic was questioned because it did not reveal the percentage of the protected classes who were actually fired as a result of illicit methadone use. Finally, the courts surmised that since the district court had found that few, if any, methadone users

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[21] *Id.* at 99-100, 17 FEP Cas. at 228. Before the district court order became final, Congress passed the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1976), which permitted the recovery of reasonable attorney's fees in actions based on 42 U.S.C. § 1983 (1976). The district court, upon the plaintiff's motion, held this statute to be an alternative basis for the award of attorney's fees. The circuit court affirmed the district court's rationale.

[22] 558 F.2d at 99-100, 17 FEP Cas. at 228.

[23] 440 U.S. at 594. Although the Court reversed the judgment of the circuit court, the Supreme Court did not consider whether the T.A.'s employment policy would be unlawful if it was also applied to former methadone users. Instead, the Court merely noted that the district court had expressed some confusion as to whether the T.A. did in fact extend its exclusionary policy to former methadone users and moved on to consider the effect of the policy on only current methadone users. *Id.* at 572 n.3. Justice Powell concurred in the Court's holding with regard to the constitutionality of the policy as it applies to current methadone users, but he dissented from the Court's refusal to consider the legality of a policy of excluding former methadone users. *Id.* at 596 (Powell, J., concurring and dissenting). He believed that both the district and the circuit courts which had previously heard the case, as well as both parties to the litigation, had interpreted the T.A. hiring policy to exclude all former methadone users who had been free of methadone use for less than 5 years. *Id.* Consequently, he felt that the court should resolve this issue as well. *Id.*

[24] *Id.* at 583 n.24. The Court concluded that it was appropriate to resolve the issue at this time because the question was fully aired before the district court, because settled legal principles were applied to uncontroversial facts, and because the parties had briefed and argued the issue before the Supreme Court.

[25] *Id.* at 587 n.31.

[26] 414 F. Supp. at 278-79, 15 FEP Cas. at 1606.

[27] *Id.*

would exhibit symptoms of drug use, it was likely that no methadone users would be among the group of people referred to the medical director for suspected violations. Because these variables were not specifically accounted for, the Court determined that the data was not sufficient to support a prima facie case of disparate impact.[28]

The second class of statistics considered by the district court used non-applicant data,[29] comparing the racial composition of city dwellers who would be excluded from employment with the Transit Authority as a result of the no methadone policy with the racial composition of New York City as a whole. On the basis of these statistics, the district court had found that between 62 percent and 65 percent of the methadone users in New York City were Black or Hispanic.[30] It concluded, moreover, that this statistic established the plaintiff's prima facie case because it demonstrated that the Transit Authority's exclusionary policy has "a substantially greater impact on minority groups than on whites."[31]

The Supreme Court, however, was unwilling to attribute the same amount of significance to the plaintiffs' statistical evidence. Although acknowledging the possibility that a prima facie case may be established through the use of non-applicant data,[32] the majority cited *Teamsters v. United States*[33] for the proposition that the utility of non-applicant data may be undermined by evidence that it does not accurately reflect the demographic characteristics of the pool of actual applicants.[34] The majority then noted several variables not considered by the plaintiffs, which might undermine the significance of their data.

One of the concerns that the *Beazer* Court had with the plaintiff's use of non-applicant data was that the data covered all methadone users, not just those who had been successfully maintained in the program for at least a year.[35] The plaintiffs' failure to narrow their data in this manner concerned the Court because the possibility remained that the data did not reflect the more narrowly defined pool of methadone users recognized as the class entitled to relief by the district court.[36] The Court also criticized the data because it failed to exclude both methadone users who were unemployable be-

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[28] 440 U.S. at 584-85 & 585 n.26.

[29] This chapter defines non-applicant data broadly to mean any statistical evidence based on some source other than information about actual applicants for the job. The term includes both general population data as well as more specific statistics concerning the racial makeup of the community labor market.

[30] 414 F. Supp. at 279, 15 FEP Cas. at 1606.

[31] *Id.*

[32] 440 U.S. at 586 n.29 *citing* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

[33] 431 U.S. 324, 340 n.20 (1977).

[34] 440 U.S. at 586 n.29.

[35] *Id.* at 585-86.

[36] *Id.* The district court concluded that the policy was only unconstitutional as applied to methadone users who had been in the program for at least a year. 399 F. Supp. at 1058.

cause of a non-drug related disability[37] and those who were otherwise employable but who were employed at some other job at the time that the lawsuit was filed, and hence were unavailable for work with the Transit Authority.[38] Finally, the majority criticized the data because it included only methadone users who were involved in publicly funded methadone programs and therefore it provided no information about the nearly 14,000 methadone users involved in private programs.[39] Because the plaintiffs failed to demonstrate that these unconsidered variables would not affect the percentages of Blacks and Hispanics who would be excluded from Transit Authority jobs because of their methadone use, the Court dismissed the non-applicant data as "virtually irrelevant."[40]

Although the Court was extremely critical of the plaintiff's use of statistics to establish its prima facie case, it did not rest its reversal on this ground. Instead, the Court noted that even if the plaintiff's evidence was sufficient to establish a prima facie showing of disparate impact, the prima facie case was effectively rebutted by the defendant's demonstration of a business necessity.[41] Although the Supreme Court expressly reversed the district court's conclusion on this issue, there was very little discussion in the opinion about the basis for the reversal. In a footnote,[42] the Court simply noted the district court's finding that the T.A.'s legitimate goals of safety and efficiency were significantly served by the policy of exclusion even though the total exclusion of methadone users was not required by these goals.[43] On this basis the Court concluded that policy "bears a manifest relationship to the employment in question"[44] and therefore "whether or not respondents' weak showing was sufficient to establish a prima facie case, it clearly failed to carry respondents' ultimate burden of proving a violation of Title VII."[45]

Having concluded that the Transit Authority's exclusionary policy did not violate Title VII, the Court next considered whether the policy could withstand the scrutiny required by the equal protection clause of the fourteenth amendment.[46] The Court noted that only a minimum rational justification was required since the policy did not mark a class of persons by virtue of

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[37] 440 U.S. at 586 & 586 n.28. The Court was concerned that a substantial number of methadone users would not be employed anyway because of alcohol abuse or illicit drug use and that the general data might not accurately reflect the racial makeup of the class of methadone users who might actually seek jobs with the T.A. *Id.*

[38] *Id.* at 586. The Court was apparently concerned that the racial makeup of methadone users who were unemployed and hence available for work with T.A. would differ from the general citywide statistics.

[39] *Id.* at 586 & 586 n.30. The dissenting opinion disputed this conclusion. *Id.* at 601 & 601 n.6 (White, J., dissenting).

[40] *Id.* at 586.

[41] *Id.* at 587.

[42] *Id.* at 587 n.31.

[43] *Id. citing* Beazer v. New York City Transit Authority, 399 F.2d 1032, 1049-50 (S.D.N.Y. 1975).

[44] 440 U.S. at 587 n.31 *quoting* Griggs v Duke Power Co., 401 U.S. 424, 432 (1971).

[45] *Id.*

[46] *Id.* at 587-94.

"some unpopular trait or affliction."[47] Such justification was found in the articulated rationale of public safety, even though the class of people excluded under the policy was overinclusive.[48]

The major impact of this decision is on the burden of proof borne by plaintiffs and defendants respectively in disparate impact employment discrimination cases. The leading case on the proper use of statistical evidence in a disparate impact claim is *Dothard v. Rawlinson*.[49] In *Dothard*, a female applicant for the position of prison guard in the Alabama prison system challenged a state statute which established minimum height and weight requirements for guards on the ground that the statute excluded a disproportionate percentage of women.[50] To prove her prima facie case, the plaintiff intro-

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[47] *Id.* at 592-93. The classification for purposes of the equal protection challenge was based solely on methadone use, not on racial background. This was necessary since the fourteenth amendment has been interpreted by the Court to require proof of intentional discrimination, see cases cited at note 3 *supra*, and the district court had found that the policy was not motivated by an intent to discriminate on the basis of race. 414 F. Supp. at 279, 15 FEP Cas. at 1606. Considered only from the perspective that it treats methadone users differently from non-methadone users, the Court likened its analysis to those cases sustaining state policies which draw classifications for noninvidious reasons–"where the test of validity requires that the rule be only rationally related to the purposes for which it was intended." Barbier v. Connolly, 113 U.S. 27, 31 (1885); *see* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976).

[48] 440 U.S. at 589-94.

[49] 433 U.S. 321 (1977). There are two other recent Supreme Court cases which are concerned with the proper use of statistics in proving a Title VII violation; Teamsters v. United States, 431 U.S. 324 (1977) and Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). Although these cases involved claims of disparate treatment as opposed to disparate impact, both decisions provide valuable insights to the use of general population data in proving a Title VII violation. In *Teamsters*, the plaintiffs relied in part on a comparison of statistics concerning the racial composition of the communities in which the employer hired, with the racial makeup of the employer's workforce. In a footnote, the Court endorsed the use of non-applicant data cautioning only that such statistics are not irrefutable. 431 U.S. at 339 n.20. *Hazelwood* also involved the use of non-applicant data to prove a discriminatory purpose. Here, however, the Court refined the rules governing the use of non-applicant data by the development of the labor market concept. This concept required that in instances where the job in question involves skills not easily acquired, the proper comparison should be between the workforce and those people in the community who possess the requisite skills. 433 U.S. at 308 & 308 n.13. *Hazelwood* is also important for the majority's suggestion that if applicant data can be obtained, it might be very relevant. *Id.* at 308 n.13.

These developments do not appear to be relevant in *Beazer*, however, since there was no allegation that the jobs available at the T.A. required any type of skilled labor as was necessary in *Hazelwood*. The statement concerning the relevance of applicant data also does not seem to apply in *Beazer* because even if such data were available, the defendants refused the plaintiff's requests to discover such information. 440 U.S. at 599 (White, J., dissenting). For excellent discussions of the effect of *Dothard, Hazelwood* and *Teamsters* on the use of statistics in proving Title VII violations *see* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis under Title VII*, 56 TEX. L. REV. 1 (1977); Note, *The Role of Statistical Evidence in Title VII Cases*, 19 B.C.L. REV. 881 (1978).

[50] 433 U.S. at 328-29.

duced statistics showing both that a substantially smaller percentage of women were employed as prison guards than were in the total Alabama work force and that, on the basis of national census statistics, the statute would exclude a far greater percentage of women than men.[51] The defendants attempted to attack the latter statistic on the ground that the plaintiff should be required to produce data regarding the actual applicants for prison guard positions.[52] The court rejected this position. Instead, it declared that "[t]here is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."[53] In discussing the appropriateness of the general population data relied on by the plaintiffs, the Court merely noted that reliance on general population data was permissible so long as there was no reason to believe that the data did not reflect the characteristics of the relevant labor market.[54]

While the *Beazer* Court acknowledged its earlier conclusion in *Dothard* that non-applicant data could be used in proving a disparate impact claim,[55] the Court applied a much more exacting level of scrutiny to the plaintiff's non-applicant statistics in *Beazer*. Specifically, the *Beazer* Court declared that the citywide statistics relied on by the plaintiffs were "virtually irrelevant" because they failed to account for several variables which could skew the conclusions to be drawn from the data about the racial composition of methadone users actually available for work with the Transit Authority.[56] The Court reached this conclusion even though the defendant offered no evidence suggesting that the failure to account for these variables would invalidate the conclusions drawn by the district court. If this approach is adopted as a general rule in disparate impact cases, a defendant will be able to thwart any prima facie case based upon non-applicant data by merely mentioning the existence of uncontrolled variables. The adoption of a rule which permits non-applicant data to be attacked without any evidence that the data is not representative of the pool of actual applicants would thus be inconsistent with *Dothard* and earlier decisions establishing the utility of non-applicant data because in practice it would keep plaintiffs from relying on non-applicant data which was not susceptible of a minute breakdown into a variety of subgroups.[57]

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[51] Id. at 329-30. Only the second statistic used by the Court in *Dothard* will be discussed in this chapter.

[52] *Id.* at 330.

[53] *Id.*

[54] *Id.* at 330-31.

[55] 440 U.S. at 586 n.29.

[56] 440 U.S. at 585-86.

[57] In *Beazer*, the Court noted several variables which, because they were unaccounted for, detracted from the relevance of the plaintiff's statistics. See discussion in text at notes 46-50 *supra*. The effect of this criticism would be to require the plaintiff to obtain statistics which considered all methadone clinics, both public and private in New York City; which considered only those methadone users unemployed and hence available for work; and which distinguished between methadone users who had successfully been maintained on methadone for at least a year and which were, at the time the suit was commenced, free from any drug or alcohol use. Most generally available data does not control for every possible variable which might arise in Title VII litigation. Thus in many cases a plaintiff who sought to rely on non-applicant data to prove his prima facie case might be required to expend considerable sums of money in order to obtain data independently.

Beazer is also a significant decision because of the majority's use of the business necessity concept. This term was first employed by the Supreme Court in *Griggs v. Duke Power*.[58] There, the Court declared both that "business necessity" is the central factor in testing the validity of an employer's hearing criteria and that the burden of proving business necessity is on the employer.[59] In *Albemarle Paper Co. v. Moody*,[60] the court further defined the business necessity concept when it is used to evaluate the use of scored tests as hiring criteria. *Albemarle* affirmed the requirements that business necessity must be established wherever a hiring policy has a significant disparate impact on a group protected by Title VII. The decision went even further, however, by requiring that a hiring policy involving a scored objective test must be validated by a professionally conducted study showing a substantial correlation between test results and important characteristics which are relevant to the job for which the candidate is being considered.[61] The court has not yet resolved the question of the extent to which the formal validation requirements of *Albermarle* will be applied to non-scored objective hiring criteria such as that involved in *Beazer*. However, in *Dothard* the Court refused to approve the use of hiring criteria shown to cause a disparate impact in the absence of evidence demonstrating that the criteria was necessary to safe and efficient job performance.[62] In addition, those lower federal courts which have considered the nature of the defendant's burden to prove a business necessity have considered it to be substantial.[63]

In *Beazer*, the Court significantly eased the employer's burden in justifying a facially discriminatory hiring policy as a business necessity. In reaching its decision the Supreme Court emphasized the district court's finding that the Transit Authority might lawfully exclude all illegal drug users and some methadone users from certain "safety sensitive" jobs in the interests of safety and efficiency. The Surpreme Court, however, concluded that this public safety rationale was sufficient to justify a rule barring all methadone users from any employment with the Transit Authority, even though such a policy would exclude certain otherwise qualified members of the class from employment.[64] As applied in *Beazer*, the business necessity test is closer to the

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[58] 401 U.S. 424 (1971).

[59] *Id.* at 432.

[60] 422 U.S. 405 (1975).

[61] *Id.* at 431.

[62] 433 U.S. at 331-32 & 331 n.14.

[63] *See, e.g.*, Donnell v. General Motors Corp., 576 F.2d 1292, 1299, 17 FEP Cas. 712, 718 (8th Cir. 1978) (describing the defendant's burden as a heavy one); James v. Stockham Valve Co., 559 F.2d 310, 350, 15 FEP Cas. 827, 860 (5th Cir. 1977) ("to be justifiable under the business necessity doctrine a seniority system must be essential to the goals of safety and efficiency"); Pettaway v. American Cast Iron Pipe Co., 494 F.2d 211, 245, 7 FEP Cas. 1115, 1142 (5th Cir. 1974) (adopting the *Lorillard* test); Robinson v. Lorillard Corp., 444 F.2d 791, 798, 3 FEP Cas. 653, 657-58 (4th Cir. 1971) ("the test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"). *But see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (letting the mere articulation of some legitimate nondiscriminatory reason stand as justification in an individual discrimination case based on an intentional discrimination theory).

[64] 440 U.S. at 587 n.31.

standard of scrutiny applied to non-suspect classifications under the equal protection clause than it is to traditional notions of business necessity. Like the minimal justification test applied in equal protection cases,[65] the test of business necessity used in *Beazer* would permit an employer to justify a facially discriminatory hiring policy without demonstrating that it is necessary to serve the legitimate interest advanced to support the policy. Such a test stands in sharp contrast to the more rigorous standards required by the Court in *Albermarle*, *Dothard* and in those federal circuit and district courts which have considered the concept. Moreover, as was indicated by Justice Marshall in his dissenting opinion in *Beazer*, the growing similarity between the Title VII concept of business necessity and the requirements of the equal protection clause seems directly contrary to the Court's statement in *Washington v. Davis* that Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution . . . ."[66]

2. *Rebuttal of a Prima Facie Case—Age Discrimination:* Marshall v. Westinghouse Electric; Marshall v. Arlene Knitwear

An unresolved issue under the Age Discrimination in Employment Act of 1967[1] (ADEA) is whether the standard of proof for rebuttal of a *prima facie* case should be the same in age discrimination cases as it is in race and sex discrimination cases under Title VII of the Civil Rights Act of 1964[2] (Title VII). To establish a *prima facie* case of age discrimination, a discharged employee (or the Secretary of Labor suing on his behalf)[3] must show that he was within the statutorily protected age group;[4] that he was discharged; that the employer sought to replace him with a younger person and that he was replaced with a younger person outside the protected group.[5] To rebut a *prima facie* case of age discrimination, an employer may utilize the defenses provided in section 623(f) of Title 29.[6] These are: (1) that age is part of a

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[65] *See, e.g.*, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Phillips Chemical Co. v. Sumas School Dist., 361 U.S. 376, 385 (1960).

[66] 426 U.S. 229, 247 (1976) *quoted in Beazer*, 440 U.S. at 602 (White, J., dissenting).

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[1] 29 U.S.C. §§ 621-634 (1976) (originally enacted as Pub. L. No. 90-202, 81 Stat. 602 (1967)).

[2] 42 U.S.C. § 2000e to 2000e-17 (1976).

[3] 29 U.S.C. § 626(c) (1976) provides that the Secretary of Labor may sue to enforce the right of a discharged employee.

[4] The protected age group includes persons aged at least 40 but less than 70. 29 U.S.C. § 631(a) (1976), *as amended by* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189.

[5] Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735, 15 FEP Cas. 139, 143 (5th Cir. 1977); Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123, 1124-25, 15 FEP Cas. 138, 139 (5th Cir. 1977); Wilson v. Sealtest Foods Div. of Kraftco Corp., 501 F.2d 84, 86, 8 FEP Cas. 749, 750 (5th Cir. 1974).

[6] 29 U.S.C. § 623(f) (1976). The ADEA is codified in Title 29 of the U.S. Code. See note 1 *supra*.

bona fide occupational qualification, (2) that the discharge was based on reasonable factors other than age, or (3) that the discharge was for good cause.

In comparison, a discharged employee may establish a *prima facie* case of racial discrimination in violation of Title VII by showing that he belonged to a racial minority; that he was qualified for the job he was performing; that he was satisfying the normal requirements in his work; that he was discharged; and that after his discharge the employer assigned white employees to perform the same work.[7] Title VII allows the use of the *bona fide* occupational qualification defense only when the alleged discrimination is based on religion, sex or national origin; it is not available in race discrimination cases.[8] Title VII case law has developed a "business necessity" defense in race cases.[9] The employer defends by proving that business reasons, rather than impermissible factors such as race, prompted the dismissal or failure to hire. This is analogous to the statutory "reasonable factors other than age" defense in ADEA cases. To rebut a *prima facie* case of race discrimination, an employer must "articulate some legitimate, nondiscriminatory reason"[10] for dismissing or failing to hire the employee. The employee must be given a final opportunity to prove that the reasons articulated by the employer are in fact a mere pretext for discrimination.[11] This approach provides each party with a fair opportunity to develop its case.

During the *Survey* year, the District Court for the Eastern District of New York held in *Marshall v. Arlene Knitwear, Inc.*[12] that the same standard of proof should be applied in ADEA cases as in Title VII cases. Thus, once the ADEA plaintiff had established a *prima facie* case, the defendant could rebut by proving the existence of a nondiscriminatory reason for the plaintiff's dismissal. The plaintiff must then be given an opportunity to show that the reason asserted by the defendant was a mere "pretext"; *i.e.*, that the plaintiff's age, and not the factor asserted by the defendant, was the real reason for the plaintiff's dismissal. The *Arlene Knitwear* court stated that the defendant would prevail only upon proving by a preponderance of the evidence that the plaintiff's dismissal was based on a reasonable factor other than age.[13] In contrast, the Fifth Circuit in *Marshall v. Westinghouse Electric Corp.*[14] held that a less stringent standard for rebuttal should be applied in ADEA cases than in Title VII cases. The court stated that successful rebuttal of a *prima facie* case required only that the defendant "go forward" with evidence demonstrating the existence of a nondiscriminatory reason for the plaintiff's dismissal.[15]

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[7] Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282, 14 FEP Cas. 1265, 1268 (7th Cir. 1977).

[8] 42 U.S.C. § 2000e-2(e) (1976).

[9] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[10] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[11] *Id.* at 804.

[12] 454 F. Supp. 715, 17 FEP Cas. 1233 (E.D.N.Y.) (1978).

[13] *Id.* at 728, 17 FEP Cas. at 1243-44.

[14] 576 F.2d 588, 17 FEP Cas. 1288, *rehearing denied*, 582 F.2d 966, 18 FEP Cas. 501 (5th Cir. 1978).

[15] 576 F.2d at 592, 17 FEP Cas. at 1291.

Several courts had considered the issue of the defendant's burden in rebutting a *prima facie* case of age discrimination prior to the decisions in *Arlene Knitwear* and *Westinghouse*.[16] Most of these courts, however, limited their discussion to whether the burden of persuasion or merely the burden of production shifted to the defendant upon the plaintiff's presentation of a *prima facie* case. Regardless of how the defendant's burden is characterized, the crucial question is whether the ADEA plaintiff, like the Title VII plaintiff, is to be allowed an opportunity to respond to the defendant's evidence by showing that the defendant's purported nondiscriminatory reason is pretextual.[17] The purpose of the ADEA would be defeated if a defendant could prevail by presenting evidence, for instance, that the plaintiff's job performance was unsatisfactory, when in fact the defendant retained or hired younger employees whose performance was comparable to the plaintiff's. The ADEA is violated even when age is not the only reason for an employee's dismissal.[18] The approach of the *Arlene Knitwear* court appears to be correct because it clearly provides an ADEA plaintiff with an opportunity to show pretext.

In *Arlene Knitwear,* an employer dismissed a sixty-two year old clothing designer after telling her that he was liquidating the business and discharging all the designers. Instead, he retained two younger designers and continued the business. The Secretary of Labor sued the employer for violation of the ADEA. The employer defended on the ground that the discharge was "based on reasonable factors other than age."[19] He claimed that the two younger employees were more competent and that their designs sold better than those of the discharged employee.[20] The employer was unable, however, to produce records to support these claims. In the absence of such evidence, the court was persuaded by oral testimony, and by the fact that the discharged employee had been paid more than the younger employees, that incompetence had not been the true reason for her dismissal.[21] The court then decided that the Title VII standard of proof, which requires the defendant to prove the existence of a nondiscriminatory reason by a preponderance of the evidence, should be applied in ADEA cases because "[t]he statutes are remedial in nature, and the ADEA was clearly patterned after Title VII. Age dis-

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[16] Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114, 14 FEP Cas. 813, 814 (8th Cir. 1977) (defendant bears burden of persuasion); Laugesen v. Anaconda Co., 510 F.2d 307, 313, 10 FEP Cas. 567, 571 (6th Cir. 1975) (defendant bears burden of production); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1308, 14 FEP Cas. 952, 959 (E.D. Mich. 1976) (defendant bears burden of production).

The Fifth Circuit has consistently held that the defendant bears only the burden of production. Price v. Maryland Cas. Co., 561 F.2d 609, 612, 16 FEP Cas. 84, 86 (5th Cir. 1977); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736, 15 FEP Cas. 139, 144 (5th Cir. 1977); Bittar v. Air Canada, 512 F.2d 582, 582-83, 10 FEP Cas. 1137, 1138 (5th Cir. 1975).

[17] In O'Connell v. Ford Motor Co., 11 FEP Cas. 1471 (E.D. Mich. 1975), the court stated that an ADEA plaintiff should be allowed an opportunity to show pretext. *Id.* at 1472.

[18] Laugesen v. Anaconda Co., 510 F.2d 307, 317, 10 FEP Cas. 567, 574 (6th Cir. 1975).

[19] *See* 29 U.S.C. § 623(f)(1) (1976).

[20] 454 F. Supp. at 729, 17 FEP Cas. at 1244.

[21] *Id.* at 730, 17 FEP Cas. at 1245.

crimination, while often more subtle than race or sex discrimination, is equally pernicious."[22]

The court found it unnecessary to provide the plaintiff with a specific opportunity to prove pretext because it was simply unpersuaded of the veracity of the defendant's assertion that the plaintiff was less competent than the other designers. Nevertheless, the court noted that if the employer had successfully proved the existence of a nondiscriminatory reason, the employee would still be given an opportunity to show that the purported reason was in fact a mere pretext.[23] The court emphasized that it was not requiring the employer to prove the nonexistence of discrimination: "The employer does not have the burden of proving that it did not discriminate; if it proves any legitimate, nondiscriminatory reason, it remains for the plaintiff to prove that that reason was a pretext for discrimination or was applied in a discriminatory fashion."[24]

In contrast, the Fifth Circuit in *Westinghouse* held that an employer, when defending a charge of age discrimination on the ground that the discharge was "based on reasonable factors other than age,"[25] is not required to prove the existence of reasonable factors by a preponderance of the evidence.[26] Instead, the employer has only to go "forward with the evidence to demonstrate reasonable factors other than age for the plaintiff's discharge."[27] The court did not state whether the plaintiff would be allowed to show that the asserted factors were not the true reason for his discharge, but clearly denied any need to follow Title VII precedent on this issue.[28]

In *Westinghouse*, an employee who had worked for Westinghouse from 1948 to 1973 claimed that he had been dismissed because of his age. The Secretary of Labor sued Westinghouse for violation of the ADEA. Westinghouse defended the action by claiming that the employee's dismissal was based on incompetence rather than age. Westinghouse admitted that the employee had been "an excellent field operator,"[29] but deemed him incompetent as an administrator, claiming that he was unable to keep up with paperwork and experienced difficulties in handling customer complaints and in dealing with his supervisor.[30] The district court decided that age had not been a factor in the employee's dismissal and ruled for the defendant.[31]

On appeal to the Fifth Circuit, the Secretary argued that since a *prima facie* case of age discrimination had been presented, Westinghouse should be required to demonstrate that the criteria used to evaluate this employee's performance were also applied to evaluate all other similarly situated employees.[32] The court characterized this argument as shifting the burden

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[22] *Id.* at 728, 17 FEP Cas. at 1243-44.
[23] *Id.* at 729, 17 FEP Cas. at 1244.
[24] *Id.* at 728-29, 17 FEP Cas. at 1244.
[25] 29 U.S.C. § 623(f)(1) (1976).
[26] 576 F.2d at 591-92, 17 FEP Cas. at 1291.
[27] *Id.* at 592, 17 FEP Cas. at 1291.
[28] *Id.* at 591-92, 17 FEP Cas. at 1291.
[29] *Id.* at 590, 17 FEP Cas. at 1289.
[30] *Id.*
[31] Usery v. Westinghouse Elec. Corp., 17 FEP Cas. 1287 (S.D. Fla. 1976).
[32] 576 F.2d at 590, 17 FEP Cas. at 1289.

of persuasion to the defendant. It refused to require an employer to do more than demonstrate the existence of reasonable factors other than age.[33] To support this conclusion, the court of appeals noted distinctions among the defenses provided by section 623(f)[34] of Title 29: (1) that age is part of a *bona fide* occupational qualification, (2) that the discharge was based on reasonable factors other than age, or (3) that the discharge was for good cause. The court characterized a claim that age is a *bona fide* occupational qualification as an affirmative defense. The use of an affirmative defense, the court reasoned, shifts the burden of persuasion by choice to the employer who has in effect admitted the employee's *prima facie* case.[35] In contrast, the employer who justifies his action by claiming reasonable factors other than age or good cause actually denies the employee's *prima facie* case, and thus, in the court's view, should not bear the burden of persuasion.[36]

In declining to apply the Title VII standard of proof in an ADEA case, the Fifth Circuit noted its own decision in *Turner v. Texas Instruments, Inc.*[37] In *Turner* the court held that an employer charged with race discrimination in violation of Title VII must prove the existence of a legitimate, nondiscriminatory reason for the employee's dismissal by a preponderance of the evidence in order to rebut a *prima facie* case.[38] The court distinguished age discrimination from race discrimination, and borrowed language from a prior decision to explain its rationale.

> Because the aging process causes employees constantly to exit the labor market while younger ones enter, simply the replacement of an older employee by a younger worker does not raise the same inference of improper motive that attends replacement of a black by a white person in a Title VII case.[39]

The court concluded that to impose the requirement desired by the Secretary—that defendants show that the differentiating criteria applied to the plaintiff were applied equally to all similarly situated employees—would in effect require defendants to prove that the reasons asserted were "nonpretextual". Such a requirement, in the court's view, would place a burden on defendants that would be *greater* than the burden imposed on Title VII defendants.[40] The court thus asserted that Title VII defendants need not show that they applied the same differentiating criteria to employees of all races.

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[33] *Id.*, 17 FEP Cas. at 1290.

[34] 29 U.S.C. § 623(f) (1976).

[35] 576 F.2d at 591, 17 FEP Cas. at 1290.

[36] *Id.*

[37] 555 F.2d 1251, 15 FEP Cas. 746 (5th Cir. 1977).

[38] *Id.* at 1255, 15 FEP Cas. at 748.

[39] Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736, 15 FEP Cas. 139, 144 (5th Cir. 1977), *quoted in* 576 F.2d at 591-92, 17 FEP Cas. at 1291.

The validity of this distinction between age and race discrimination is challenged by the author of Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976), who points out that, "given the percentages of blacks and whites in the workforce, it is also likely that, absent any discrimination, a black worker who has been fired or refused a job will be replaced by a white employee . . . ." *Id.* at 392.

[40] 576 F.2d at 592, 17 FEP Cas. at 1291.

It is not clear that the Fifth Circuit's holding in *Westinghouse* is a correct statement of Title VII law. The Supreme Court in *Furnco Construction Corp. v. Waters*,[41] a race discrimination case, stated that an employer had the burden "of proving that he based his employment decision on a legitimate consideration, and not on an illegitimate one, such as race."[42] Yet a few months later, in *Board of Trustees v. Sweeney*,[43] the Court vacated a First Circuit decision because it "requir[ed] the defendant *to prove absence of discriminatory motive*,"[44] and remanded the case for reconsideration in light of *Furnco*. The Court stated that the defendant's burden is that of "merely 'articulat[ing] some legitimate, nondiscriminatory reason' " and not that of " 'prov[ing] absence of discriminatory motive.' "[45] Exactly what the defendant must show in regard to legitimate, nondiscriminatory reasons under *Furnco* and *Board of Trustees v. Sweeney* is thus unclear. These decisions, however, do not change the requirement that a Title VII plaintiff be given an opportunity to prove pretext.

In view of the apparent confusion in Title VII law, it is difficult to assess the correctness of the Fifth Circuit's statement in *Westinghouse* that a Title VII defendant need not show that he applied the same criteria to all employees. The *Westinghouse* decision, however, did not rest on the court's reading of Title VII law. The court stated further that the Title VII standard (whatever that standard was) need not be applied in ADEA cases since a *prima facie* case of age discrimination did not raise "the same inference of improper motive"[46] as a *prima facie* case of race discrimination. It is this statement by the *Westinghouse* court which appears questionable when compared to the reasoning of the *Arlene Knitwear* court, which viewed age discrimination and race discrimination as "equally pernicious."[47]

The *Westinghouse* court rejected the Secretary of Labor's argument that the employer must show that it employed the same criteria to all employees because it would require the defendant to prove that the asserted nondiscriminatory reasons were "non-pretextual".[48] The court, however, did not elaborate on the meaning of "non-pretextual". Under one possible interpretation, the employer would need to prove that the asserted reason was true; for example that the employee's incompetence could be objectively shown. Alternatively, proving non-pretextuality could mean that the employer must establish first that the employee was incompetent and second that incompetence was the sole reason for the employee's dismissal; i.e., that the employer also would have dismissed a younger employee of the same level of competence. The Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*[49] supports the second interpretation, but suggests that the plaintiff

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[41] 438 U.S. 567 (1978).
[42] *Id.* at 577.
[43] 439 U.S. 24 (1978).
[44] *Id.* at 25.
[45] *Id.*
[46] 576 F.2d at 591-92, 17 FEP Cas. at 1291.
[47] 454 F. Supp. at 728, 17 FEP Cas. at 1244.
[48] 576 F.2d at 592, 17 FEP Cas. at 1291.
[49] 411 U.S. 792 (1973).

must prove pretextuality rather than non-pretextuality. In *McDonnell Douglas*, an employer contended that it had refused to rehire a discharged black employee because he had engaged in unlawful disruptive acts against the employer.[50] The Supreme Court stated that the employee must be given an opportunity to prove that this justification was a pretext for discrimination,[51] and described the type of evidence which would be relevant to such proof. The Court suggested that if it could be shown that white employees who had engaged in similar acts were retained or rehired, the asserted reason would be revealed as a pretext for discrimination.[52]

Perhaps the *Westinghouse* court merely meant that while it is reasonable to allow employees an opportunity to prove that employers' asserted reasons are pretextual, it is unreasonable to require employers to prove the contrary. However, the court failed to state whether it would allow employees the opportunity to prove that the asserted reasons are a pretext for discrimination. Since the court clearly denied any need to follow the Title VII decisions on rebuttal of a *prima facie* case of discrimination,[53] it appears to have rejected the Title VII requirement that the plaintiff have such an opportunity. Under *Westinghouse*, the trial apparently is over after the defendant articulates a reasonable, nondiscriminatory reason other than age for the employee's dismissal. The employee is not allowed to show that the asserted reason for dismissal is not the real reason.

The *Westinghouse* court's distinction between the treatment of Title VII plaintiffs and ADEA plaintiffs is unwarranted. Congress' failure to include age discrimination among the activities prohibited by Title VII does not indicate that it intended less favorable treatment for age discrimination plaintiffs than for those claiming discrimination based on race, sex, or national origin. Title VII contained a provision directing the Secretary of Labor to study the problem of age discrimination and to submit a report to Congress.[54] The Secetary submitted his report in 1965, noting the prevalence of age discrimination and its deleterious effects, and recommending remedial legislation.[55] Congress could have simply amended Title VII to include age discrimination. Instead, it enacted a separate statute. One reason for this decision was the perception that the EEOC, as of 1967, was "overburdened" with Title VII complaints "and that age discrimination complaints could be handled more efficiently by the Wage and Hour Division of the Department of Labor."[56] This does not indicate that Congress wanted the courts to treat ADEA complaints and Title VII complaints differently with regard to standards of proof.

The Secretary's report suggested that age discrimination, although a serious problem, is not motivated by "dislike or intolerance for the older

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[50] *Id.* at 797.

[51] *Id.* at 804.

[52] *Id.*

[53] 576 F.2d at 591-92, 17 FEP Cas. at 1291.

[54] Title VII, § 715, 78 Stat. 265 (1964) (current version at 42 U.S.C. § 2000e-14 (1976)).

[55] U.S. DEPARTMENT OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965).

[56] 90 HARV. L. REV., *supra* note 39, at 381.

worker,"[57] but by misconceptions about the abilities of older workers. Thus, while race discrimination might be based on irrational hostility towards racial minorities, age discrimination was seen to result from employers' exaggerated concerns about the competence of older workers. Congress recognized that some physically demanding jobs in fact might be unsuitable for older workers. This recognition is reflected by the insertion in the ADEA of the *bona fide* occupational qualification defense which is not available in race discrimination cases. While an employer may justify an employment decision by asserting that an older worker would be unable to perform the work, he cannot claim that a minority worker, by reason of his minority status, was unqualified. The *Westinghouse* court offered no indication that Congress viewed age discrimination as less invidious than race discrimination, except where age is a *bona fide* occupational qualification. The *bona fide* occupational qualification defense is available in sex discrimination cases as well.[58] Yet this has not led courts to apply more lenient standards of proof in sex cases than in race cases.

Title VII and the ADEA not only have similar aims, the language used in each to prohibit employment discrimination is identical.[59] In view of the similarity between the statutes and the absence of any indication that Congress intended different treatment for Title VII and ADEA plaintiffs, there is no foundation for the court's assertion in *Westinghouse* that a *prima facie* case of age discrimination "does not raise the same inference of improper motive"[60] as a *prima facie* case of race discrimination. Therefore defense of an ADEA case should not be made easier than defense of a Title VII case. If the approach of the *Westinghouse* court is followed, ADEA plaintiffs will encounter extreme difficulty in proving their cases since a successful defense will require no more than the introduction of some evidence demonstrating reasonable factors other than age.

B. *Exhaustion of Administrative Remedies*

1. *Age Discrimination:* Oscar Mayer & Co. v. Evans

The Age Discrimination in Employment Act of 1967[1] (ADEA) is intended to protect individuals between 40 and 70 years of age from employment discrimination. Section 623(a) of Title 29[2] prohibits an employer from discharging or refusing to hire an individual in this group because of his or her age. Persons aggrieved by ADEA violations may sue in federal court to enforce their rights.[3] The language of the ADEA, however, does not clearly indicate

[57] U.S. DEPARTMENT OF LABOR REPORT, *supra* note 55, at 6, *quoted in* 90 HARV. L. REV., *supra* note 39, at 383.

[58] 42 U.S.C. § 2000e-2(e) (1976).

[59] *Compare* 29 U.S.C. § 623 with 42 U.S.C. § 2000e-2(a) (1976).

[60] 576 F.2d at 592, 17 FEP Cas. at 1291.

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[1] 29 U.S.C. §§ 621-634 (1976) (originally enacted as Pub. L. No. 90-202, 81 Stat. 602 (1967)).

[2] *Id.* § 623(a). The ADEA is codified in Title 29 of the U.S. Code. See note 1 *supra*.

[3] *Id.* § 626(c).

whether an employee must first seek recourse under state fair employment provisions.[4] During the *Survey* year, the Supreme Court resolved this uncertainty in *Oscar Mayer & Co. v. Evans*[5] by holding that section 633(b)[6] of Title 29 requires resort to state agencies prior to the initiation of a federal action.[7]

Section 626[8] of Title 29 sets forth the mechanics for the enforcement of the act, and section 633[9] outlines the relationship between federal ADEA enforcement and state activity in the age discrimination area. Pursuant to section 626(d), discharged employees seeking to sue their employers under the ADEA must give sixty days' notice to the EEOC of their intent to sue.[10] The purpose of this requirement is to enable the EEOC to seek informal settlement of disputes. Failure to give notice results in forfeiture of the employee's right to bring a private action under the ADEA.[11] Section 633(b) of Title 29 sets forth another limitation on the remedy. Section 633(b) provides, in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . . .[12]

The Supreme Court in *Oscar Mayer* rejected the suggestion that section 633(b) merely required a claimant who resorts to a state agency to give the agency sixty days in which to act, and held that resort to a state agency is mandatory prior to a federal suit, just as prior notice to the EEOC is mandatory under section 626(d).[13]

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[4] Resort to state agencies was held to be mandatory in Reich v. Dow Badische Co., 575 F.2d 363, 370, 17 FEP Cas. 363, 367 (2d Cir. 1978); Hadfield v. Mitre Corp., 459 F. Supp. 829, 832, 18 FEP Cas. 742, 744 (D. Mass. 1978); McCracken v. Shenango, Inc., 440 F. Supp. 1163, 1166, 16 FEP Cas. 114, 116 (W.D. Pa. 1977); Magalotti v. Ford Motor Co., 418 F. Supp. 430, 433, 15 FEP Cas. 877, 879 (E.D. Mich. 1976); Nickel v. Shatterproof Glass Corp., 424 F. Supp. 884, 886, 15 FEP Cas. 1099, 1100 (E.D. Mich. 1976). Resort was held to be optional in: Holliday v. Ketchum, MacLeod and Grove, Inc., 584 F.2d 1221, 1222, 17 FEP Cas. 1175, 1175 (3rd Cir. 1978); Smith v. Joseph Schlitz Brewing Co., 584 F.2d 1231, 1232, 17 FEP Cas. 1188, 1189 (3rd Cir. 1978), *vacated*, 99 S. Ct. 2819 (1979); Simpson v. Whirlpool Corp., 573 F.2d 957, 17 FEP Cas. 1089 (6th Cir. 1978), *vacated*, 99 S. Ct. 2819 (1979).

[5] 99 S. Ct. 2066 (1979).

[6] 29 U.S.C. § 633(b) (1976).

[7] 99 S. Ct. at 2071.

[8] 29 U.S.C. § 626 (1976).

[9] *Id.* § 633.

[10] *Id.* § 626(d). See note 13 *infra*.

[11] Reich v. Dow Badische Co., 575 F.2d 363, 367-68, 17 FEP Cas. 363, 365 (2d Cir. 1978).

[12] 29 U.S.C. § 633(b) (1976).

[13] 99 S. Ct. at 2071. At the time of the complaint in *Oscar Mayer*, this notice was to be given to the Secretary of Labor, rather than to the EEOC, but the administration of the ADEA was transferred to the EEOC by section 2 of 1978 REORG. PLAN No. 1, 43 Fed. Reg. 19,807 (May 9, 1978).

In *Oscar Mayer* the plaintiff, Joseph Evans, claimed that his employer, in violation of the ADEA, had forced him to retire because of his age.[14] As required by section 626(d), Evans notified the Secretary of Labor of his intent to sue his employer concerning the dismissal.[15] He also asked the Labor Department whether he was required to file a state complaint to preserve his federal rights under the ADEA.[16] Relying on the Department's advice that this was unnecessary, Evans sued his employer in federal court without commencing proceedings with the Iowa State Civil Rights Commission which had jurisdiction over age discrimination complaints.[17] During the time that Evans' federal claim was pending, the statute of limitations for his state claim expired.[18]

The District Court for the Southern District of Iowa rejected the defendant's argument that resort to a state agency was mandatory before the plaintiff could sue under the ADEA and held that the plaintiff's federal claim, therefore, was not barred.[19] The Court of Appeals for the Eighth Circuit affirmed this decision.[20] The Supreme Court, however, granted certiorari and reversed the lower court decisions. The Court, in an opinion written by Mr. Justice Brennan, held that section 633(b) of Title 29 does make the "commencement" of state proceedings mandatory before a federal action can be brought.[21] The Court also held, however, that the required "commencement" of state proceedings need not be within the state statute of limitations.[22] Thus, in the instant case, the plaintiff Evans could preserve his federal rights simply by filing his time-barred state claim. The Court was unanimous in its holding that resort to state agencies is mandatory, but Mr. Justice Stevens wrote a dissenting opinion, in which the Chief Justice and Justices Powell and Rehnquist joined, taking issue with the Court's holding that state statutes of limitation need not be met. Justice Stevens deemed the Court's holding regarding the statute of limitations an "advisory opinion" since the plaintiff had not yet filed a claim which the state agency had found to be time-barred. Thus, Justice Stevens maintained, that issue was not before the Court.[23]

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[14] 99 S. Ct. at 2070.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 2073.

[19] Evans v. Oscar Mayer & Co., 17 FEP Cas. 218 (S.D. Iowa 1977). The district court noted that the language of section 633(b) was not mandatory, in contrast to section 626(d) which says that "[s]uch notice *shall* be filed." The court also commented that, since a federal action automatically supersedes any state action under section 633(a), mandatory filing with the state agency would seem "unnecessary and dilatory." *Id.* at 220.

[20] The court of appeals had reversed the district court initially, Evans v. Oscar Mayer & Co., *id.* at 221, but on rehearing changed its position, placing substantial reliance on an amicus brief submitted by the Secretary of Labor. 580 F.2d 298, 17 FEP Cas. 1119 (8th Cir. 1978).

[21] 99 S. Ct. at 2073.

[22] *Id.* at 2076.

[23] *Id.* at 2077 (Stevens, J., dissenting).

In holding that section 633(b) of Title 29 requires resort to state agencies, the Court first noted the similarity between this section and section 706(b) of Title VII of the Civil Rights Act of 1964.[24] Section 706(b) of Title VII has been interpreted to make resort to state agencies mandatory in those states which have state discrimination agencies. The Court observed that section 633(b) of the ADEA was patterned after and is virtually *in haec verba* with section 706(b) of Title VII.[25] The Court then examined the legislative history of section 706(b) and found that it was intended to keep those controversies which could be handled effectively by state agencies out of the federal courts.[26] Since Title VII and the ADEA share a common anti-discrimination purpose, and since the language of their provisions on resort to state agencies is almost identical, the Court concluded that Congress must have intended section 633(b) of Title 29 to be interpreted in accordance with section 706(b).

The Court examined the employee's argument that significant differences existed between Title VII and the ADEA and that, therefore, resort to state remedies ought not to be required. Title VII, Evans noted, requires that claimants file with state agencies before filing with the EEOC, but the ADEA permits simultaneous filing with the EEOC and state agencies. The Court was unpersuaded by the employee's argument and observed that the reason for this distinction was the fear by the drafters of the ADEA that delay would be "particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.' "[27] The Court, therefore, found this distinction insufficient to justify inconsistent treatment of resort to state remedies under the ADEA and Title VII. The employee also argued that the filing of state complaints by ADEA claimants would be futile, since section 633(a) of Title 29, a provision for which Title VII has no counterpart, provides that the commencement of an ADEA action supersedes all state proceedings.[28] The Court rejected this contention, reiterating the congressional intent to provide state agencies sixty days in which to resolve age discrimination controversies before allowing the disputes into the federal courts.[29] The Court thus determined that resort to state agencies is mandatory and not optional.[30]

The Court then considered the question whether section 633(b)'s requirement that state proceedings be "commenced" meant that they must be initiated within the period specified by the state statute of limitations. Section 633(b) contains the following definition of "commencement":

> If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of a filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such

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[24] 42 U.S.C. § 2000e-5(c) (1976).
[25] 99 S. Ct. at 2071.
[26] *Id.*
[27] *Id.* at 2072 (quoting 113 CONG. REC. 7076 (1967) (remarks of Sen. Javits)).
[28] *Id.* at 2072.
[29] *Id.*
[30] *Id.* at 2073.

> statement is sent by registered mail to the appropriate State authority.[31]

Since state statutes of limitation are requirements "other than a requirement of a filing of a written and signed statement of the facts upon which the proceeding is based," the Court reasoned that the state statutes need not be complied with in order to have a valid "commencement" under section 633(b).[32] The identical definition of commencement, the Court noted, is contained in section 706(b) of Title VII and has been interpreted not to require compliance with state statutes of limitation.[33] Similarly, the Federal Rules of Civil Procedure also allow a time-barred action to be "commenced" by the filing of a complaint.[34] The Court thus concluded that state statutes of limitation need not be complied with in order to preserve federal rights under the ADEA.

Mr. Justice Blackmun wrote a separate opinion, stating that he would have preferred to have affirmed the court of appeals' holding that resort to state agencies was not mandatory. Nevertheless he concurred in the Court's decision because it was important to resolve the prevailing uncertainty as to procedure under the ADEA.[35] In his opinion Justice Blackmun addressed a problem ignored by the majority—the statement in section 626(b)[36] that ADEA is to "be enforced in accordance with the powers, remedies, and procedures [of the Fair Labor Standards Act]." This reference noted by Justice Blackmun suggests that the Fair Labor Standards Act (FLSA), and not Title VII, should be consulted in resolving procedural questions under the ADEA.[37] The FLSA does not require resort to state agencies as a prerequisite to federal actions. Thus, if the FLSA pattern were followed, ADEA claimants could forego resort to state agencies.

In 1978 the Supreme Court, in *Lorillard v. Pons*,[38] looked to the FLSA and not to Title VII to determine whether the ADEA provided a right to a jury trial in private ADEA actions for lost wages. The Court observed that, although the ADEA was similar in purpose to Title VII, its remedies and procedures were derived from the FLSA.[39] Whether Title VII guaranteed a jury trial was therefore irrelevant.[40] If the analogy followed in *Lorillard* had been applied in *Oscar Mayer*, a different result would have been reached. The approach taken by the Court in *Oscar Mayer* seems difficult to reconcile with that in *Lorillard*.

While the correctness of the *Oscar Mayer* decision is questionable in light of section 626(b)'s reference to FLSA remedies and procedures and the Court's earlier decision in *Lorillard*, the decision at least will resolve uncer-

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[31] 29 U.S.C. § 633(b) (1976).
[32] 99 S. Ct. at 2073.
[33] *Id.* at 2074.
[34] *Id.* at 2073.
[35] *Id.* at 2077 (Blackmun, J., concurring).
[36] 29 U.S.C. § 626(b) (1976).
[37] 99 S. Ct. at 2076.
[38] 434 U.S. 575 (1978).
[39] *Id.* at 584-85.
[40] *Id.* at 585.

tainty as to whether ADEA claimants must file with state agencies. Claimants may preserve their federal rights at any time merely by submitting a statement of facts to the state authorities. Nevertheless the Court's solution is vulnerable to the criticism that it permits evasion of effective state proceedings in contravention of the congressional desire that these proceedings be utilized to screen out cases from the federal courts. The state agencies will not have sufficient time to deal with claims before their proceedings are superseded by federal actions, pursuant to Title 29, section 633(a). The Court seems to have dealt adequately with this criticism by noting that after July 1, 1979, pursuant to section 2 of 1978 Reorganization Plan No. 1,[41] the EEOC assumes the administration of ADEA claims from the Department of Labor.[42] Since the EEOC has a policy of automatically referring claims to appropriate state agencies, the states will have at least some opportunity to deal with age discrimination claims prior to the commencement of federal actions. States could amend their statutes of limitation to conform with the 180 days allowed by section 626(d) of Title 29 and then toll the statutes upon the filing of a timely charge with the EEOC.[43] This would provide state agencies an opportunity to deal with age discrimination complaints without unduly burdening claimants. Thus, criticism of the decision as undermining the state's role may prove to be unfounded.

In holding that prior resort to state agencies is required of employees wishing to sue their employers under the ADEA, the Court apparently ignored section 626(b) of Title 29 as interpreted in the *Lorillard* case, which directs reference to the FLSA for procedural and remedial matters. The Court's decision, however, imposes very little hardship on ADEA plaintiffs, since it may be complied with merely by filing a statement of facts with the state agency, regardless of compliance with the state statute of limitations. Therefore, the decision represents an acceptable compromise between the desire to expedite federal age discrimination actions when disputes cannot be resolved informally and the desire to give state agencies, as well as the EEOC, an opportunity to deal with such claims.

2. *Title VII:* White v. Dallas Independent School District

Under section 706(c) of Title VII,[1] eligible state or local authorities must be given 60 days in which to handle a discrimination charge before it is filed with the federal Equal Employment Opportunity Commission [EEOC].[2] Au-

[41] 43 Fed. Reg. 19,807 (May 9, 1978).
[42] See note 13 *supra*.
[43] 99 S. Ct. at 2075-76.

[1] 42 U.S.C. § 2000e-5(c) (1976).
[2] *Id.* The provision states:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section

thorities are eligible under this provision if the practice allegedly violates a state or local law, and the state or locale has established or authorized an authority to grant or to seek relief from the practice or to institute criminal proceedings with respect thereto.[3] No further requirement for eligibility for deferral agency status appears on the face of the statute.

In 1972, the United States Supreme Court held that section 706 was satisfied if the EEOC orally transmitted a written charge received from a complainant to the appropriate state agency, waited until termination of either the state proceedings or the sixty days, and then formally filed the complaint on complainant's behalf without having obtained a second written charge.[4] The charging party could thus satisfy the pre-suit administrative procedures by filing a charge only with the EEOC and allowing them to defer to the state agency. After this decision, and presumably to facilitate the implementation of this filing practice, the EEOC promulgated a set of regulations requiring all state or local agencies that considered themselves as authorities to which prior resort was mandated under section 706, to identify themselves to the Commission and to request designation as a deferral agency.[5] Thus the EEOC placed the burden on the potential deferral agencies to come forward and assert their entitlement under section 706 to a prior opportunity to resolve discrimination claims. The regulations state that only those agencies which complied with the modification requirement would be eligible for designation as "706 agencies,"[6] and thus entitled to have charges referred to them by the EEOC.[7]

During the *Survey* year, the Court of Appeals for the Fifth Circuit in *White v. Dallas Independent School District*[8] held that the failure of a state agency to comply with the EEOC regulation requiring it to identify itself to the Commission as an eligible deferral agency did not prevent it from being considered a section 706 deferral agency.[9] The court held that the Texas district and county attorneys were in fact deferral agencies because they satisfied the literal requirements set forth by Congress in section 706(c); i.e., they were existing authorities authorized to deal with violation of the state fair employ-

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by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

[3] *Id.*

[4] Love v. Pullman Co., 404 U.S. 522 (1972).

[5] 29 C.F.R. §§ 1601.70-1601.74 (1979). 29 C.F.R. § 1601.70(a) (1979) states in part:

> Because of the large number of State and local fair employment practice agencies, only those agencies which notify the Commission of their qualification under section 706(c) of the Title VII and this section and request designation as '706 Agencies' or 'Notice Agencies' or both will be eligible for such designation.

The regulations also set up the procedures for submitting notification to the EEOC, 29 C.F.R. § 1601.70 (1979), the mechanism for Commission determinations on 706 agency applications, 29 C.F.R. § 1601.71 (1979), and a list of presently designated 706 agencies, 29 C.F.R. § 1601.74 (1979).

[6] 29 C.F.R. § 1601.70 (1979).

[7] 29 C.F.R. § 1601.13(c)(2) (1979).

[8] 581 F.2d 556, 18 FEP Cas. 204 (5th Cir. 1978).

[9] *Id.* at 561, 18 FEP Cas. at 207-08.

ment law.[10] The significance of the case lies in the court's implicit message to the EEOC that it cannot graft requirements to the existing statutory criteria set forth by Congress for determining if a state authority constitutes a deferral agency within the meaning of section 706. The EEOC does not have the discretion to decide that a state authority, which satisfies the literal language of the statute, is not entitled to deferral because it has not identified itself to the EEOC.

In August of 1973, Patsy Ruth White [White] filed charges with the EEOC claiming that the mandatory maternity leave policy of the Dallas Independent School District constituted sex discrimination in violation of Title VII.[11] She did not pursue any remedies under Texas law.[12] In July of 1974 and January of 1975 she was advised by the EEOC that reasonable cause existed to believe that Title VII had been violated and that "timeliness and all other requirements [had] been met."[13] Although the EEOC knew that some defendants were contending that Texas district and county attorneys were deferral authorities under section 706, the EEOC never advised White of this nor referred her charge to the Texas authorities.[14] The Texas authorities had failed to notify the EEOC of their eligibility as deferral agencies pursuant to the EEOC regulations requiring such notification.[15] Nevertheless, Texas did have a statute forbidding employment discrimination in public employment such as that claimed by White.[16] The statute provided for civil relief, including the granting of injunctive relief, and also made knowing violations a misdemeanor punishable by a fine of up to $1000 or one year in the county jail.[17] The provision also designated district and county attorneys as the appropriate state or local officials to receive referrals of alleged violations from the EEOC.[18]

In July of 1975, with no referral having been made to the Texas authorities, the EEOC advised White that she was entitled to sue in federal district court within 90 days after receipt of the letter.[19] White brought suit but a federal district court dismissed her claim because she had failed to pursue her Texas state remedies as required by the federal statute.[20] The Fifth Cir-

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[10] *Id.*, 18 FEP Cas. at 208.

[11] *Id.* at 558, 18 FEP Cas. at 205. In August of 1972, White, acting pursuant to the defendant's then current pregnancy policy, informed the Superintendent of Schools that she was pregnant. *Id.* She was, at that time, employed as a permanent grade school substitute teacher. *Id.* Despite a written policy that would not have permitted White to begin employment that fall because her child was due in November, she was assigned to teach in an elementary school. *Id.* The assignment was terminated after one day allegedly because of the school district policy on teacher pregnancy. *Id.* Plaintiff, in addition to her Title VII claim, also brought her suit against defendant pursuant to 42 U.S.C. § 1983 (1970). *Id.*

[12] *Id.*

[13] *Id.* at 558, 562, 18 FEP Cas. at 205, 208.

[14] *Id.* at 562, 18 FEP Cas. at 208.

[15] *Id.* at 561, 18 FEP Cas. at 207.

[16] *Id.* at 559, 18 FEP Cas. at 206.

[17] *Id.* at 559 & n.1, 18 FEP Cas. at 206 & n.1.

[18] *Id.*

[19] *Id.* at 558, 562, 18 FEP Cas. at 205, 208.

[20] *Id.* at 558, 18 FEP Cas. at 205.

cuit Court of Appeals affirmed on the ground that the state statute satisfied the requirements for deferral contained in Title VII.[21] On rehearing en banc, the court of appeals reaffirmed its earlier decision by a 16-0 vote.[22] However, it ruled by a 12-4 vote that White could still maintain her Title VII action despite the fact that the state statute of limitations had run.[23] The court, in remanding the case to the district court to determine the rights of the parties under Title VII,[24] held that the mistakes of the EEOC should not redound to White's detriment.[25]

In finding that the Texas statute created a deferral agency entitled to section 706 consideration, the court rejected three arguments put forward by the EEOC and the claimant. They first contended that in order to constitute a state with a deferral statute, the state must demonstrate some special concern in the specific area of fair employment practice beyond a general authorization to prosecute under general criminal jurisdiction.[26] The court answered the argument by finding that the Texas district and county attorneys acted in regard to unfair employment practices under the specific authorization of the state anti-discrimination statute, and not under their general criminal authority.[27] The court found that the language of section 706, which says that states may "establish or authorize" agencies, implies that states may utilize existing structures for the redress of discrimination.[28] Moreover, when the

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[21] White v. Dallas Independent School District, 566 F.2d 906, 909, 16 FEP Cas. 739, 741 (5th Cir. 1978).

[22] 581 F.2d at 561-63, 18 FEP Cas. at 208-09.

[23] *Id.* at 562-63, 18 FEP Cas. at 208-09.

[24] *Id.* at 563, 18 FEP Cas. at 209.

[25] *Id.* at 562-63, 18 FEP Cas. at 208-09.

[26] *Id.* at 559-60, 18 FEP Cas. at 206-07. The claimant relied heavily upon General Insurance Company of America v. Equal Employment Opportunity Commission, 491 F.2d 133, 7 FEP Cas. 106 (9th Cir. 1974). In that case, the Ninth Circuit rejected the argument that a state or county prosecutor could qualify as a deferral agency through his general authority to institute criminal proceedings. *Id.* at 135, 7 FEP Cas. at 107. Thus, the court held that the Washington statute, while prohibiting sex discrimination in wages, had not established or authorized any agency and therefore was insufficient to require the EEOC to defer to a state authority. *Id.* The court found that the deferral provision in section 706 required "a showing of such state concern in the specific area of unfair employment practices as to result in the establishment or authorizing of an agency to act in this area." *Id. See* White v. Dallas Independent School District, 566 F.2d 906, 909-10, 16 FEP Cas. 739, 741-42 (5th Cir. 1978), wherein Judge Tuttle found that the *General Insurance* decision was on point in this case because the Texas statute failed to establish or authorize a fair employment agency, since it only designated the district and county attorneys as the authorities to receive notice of charges from the EEOC. See text at note 18 *supra*. Judge Tuttle found:

> A state cannot qualify itself for deferral merely by designating an official to receive notice, for § 706(c) of Title VII sets up the test for determining when deferral is required. Notice to a representative of the state becomes a concern only if that test is first satisfied, and that depends upon whether the state statute meets the dual requirements of prohibiting the alleged acts and setting up an authority to deal with the problem.

Id. at 910, 16 FEP Cas. at 742. Although Judge Tuttle took part in the rehearing *en banc*, 581 F.2d at 558, 18 FEP Cas. at 205, he did not reiterate his finding.

[27] *Id.* at 560, 18 FEP Cas. at 207.

[28] *Id.*

state chooses, as in the present case, to utilize existing structures to enforce its discrimination laws, it is sufficient for the state to inform the authority of its duty, without having to repeat entire sections of the state's code devoted to the organization and procedural requirements of the offices.[29] Thus, the court held that Texas had authorized a fair employment practices agency within the meaning of section 706.

The claimant argued next that the district and county attorneys were not sufficient deferral agencies because they could not afford her remedies comparable to those available under federal law.[30] The court rejected this argument also.[31] It reasoned that the heart of the deferral requirement is that a state must prohibit the alleged act of discrimination and that the agency must be able to grant or seek relief or institute criminal proceedings.[32] The court found that a state need not be able to provide the same remedies that are available under the federal statute.[33] In so holding, the court said: "Section 706(b) requires that the states be given an opportunity to handle the matter; it does not require a state to 'clone' federal remedies."[34] Furthermore, the court pointed out that the availability of relief under state law does not preclude a Title VII litigant from recovering additional relief in federal court once the deferral period is up.[35] Thus, the court held that the district and county attorneys constituted deferral agencies despite the fact that they did not offer the full panoply of relief.

Despite the EEOC's contention to the contrary, the court also held it immaterial that district and county attorneys had not complied with the EEOC regulation requiring potential deferral agencies to assert their entitlement to deferral status.[36] The court found that it was sufficient that the Texas authorities were, in the words of the Act, "State or local authorit[ies] [authorized] to institute criminal proceedings" with respect to the alleged violation.[37] Thus, the court found that deferral was mandated by the fact that the Texas authority satisfied the requirements of section 706.[38]

Although the court thus established that the Texas district and county attorneys were entitled to deferral status, the majority held that White was not

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[29] *Id.*

[30] *Id.* The Texas statute affords the complainant injunctive relief and authorizes the district or county attorney to institute criminal proceedings. *Id.* at 559 n.1, 18 FEP Cas. at 206 n.1. Title VII, on the other hand, affords a successful claimant injunctive relief, 42 U.S.C. § 2000e-5(g) (1976), reinstatement, *id.*, back pay, *id.*, affirmative action, *id.*, attorney's fees, 42 U.S.C. § 2000e-5(k) (1976), retroactive seniority rights, Franks v. Bowman Transportation Co., 424 U.S. 747, 762-80 (1976), and "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1976).

[31] 581 F.2d at 561, 18 FEP Cas. at 207.

[32] *Id.* at 560-61, 18 FEP Cas. at 207.

[33] *Id.* at 561, 18 FEP Cas. at 207.

[34] *Id.*

[35] *Id.*

[36] *Id.*, 18 FEP Cas. at 207-08.

[37] *Id.*, 18 FEP Cas. at 208.

[38] *Id.* The court also noted that the district and county attorneys had received no notice of the regulation since the EEOC had notified only the Texas governor's office about its new requirements. *Id.* at 561 n.6, 18 FEP Cas. at 208 n.6.

barred from bringing her Title VII action because of the EEOC error.[39] The defendant school district argued that White had failed to satisfy her statutory responsibility for proper deferral for exhaustion of state remedies.[40] Moreover, defendant argued, deferral was not impossible since the two-year state statute of limitations had run on the filing of that charge with the Texas district or county attorney, and thus White's Title VII claim was time-barred as well.[41] In rejecting this argument, the court declined to rule on whether the statutory emphasis on exhaustion of remedies made deferral to an appropriate state agency a jurisdictional requirement.[42] Instead, the court simply held that, although it could not extend the state agency's authority to act on White's charge, it was unwilling to bar from federal court a charging party who had acted in good faith but was misled by the EEOC.[43] The court specifically pointed out that the EEOC had promulgated regulations requiring it to defer charges and that, at the time White's complaint was filed, the EEOC was aware of the dispute concerning the deferral status of the Texas county and district attorneys, but had failed to so notify White.[44] The case was thus remanded to the district court.[45]

The Fifth Circuit decision in the *White* case appears correct both on the issue of the EEOC regulations and on the effect on a claim of an improper action by the EEOC. There can be no doubt that the dismissal of the Commission's regulations by the *White* court, will complicate the EEOC's task of deferring charges to appropriate state and local authorities. It must be noted, however, that the EEOC voluntarily assumed this role of conduit through its own regulations, approved by the Supreme Court,[46] requiring it to forward copies of all charges to appropriate state or local agencies.[47] In fulfilling its undertaking, the EEOC should not be permitted to graft additional requirements onto the statute. A state agency's right to deferral vests when it satisfies the requirements of the statute, not when it notifies the EEOC of its eligibility. To allow the EEOC such broad discretion would circumvent the congressional purpose of facilitating conciliation or judicial disposition of the discrimination at the state level. Furthermore, it would be unjust to visit the errors of the EEOC on the charging party.[48] The EEOC's official status combined with its common practice of assisting claimants in meeting their Title VII deferral requirements certainly could have misled White into believing that no further

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[39] *Id.* at 561-63, 18 FEP Cas. at 208-09.

[40] *Id.* at 561, 18 FEP Cas. at 208.

[41] *Id.* at 561-62, 18 FEP Cas. at 208.

[42] *Id.* at 562-63, 18 FEP Cas. at 208-09.

[43] *Id.*

[44] *Id.* at 562, 18 FEP Cas. at 208. The dissent vigorously argued that the doctrine of estoppel should not be invoked against the defendant who was now unable to assert plaintiff's failure to exhaust state remedies as a defense. *Id.* at 563-64, 18 FEP Cas. at 209-10. The dissenting judge remarked that "[t]he twist is that the resort to estoppel is not necessitated by conduct of the defendant but rather by that of the *third* party, the EEOC, who would have the defendant sued." *Id.* at 564, 18 FEP Cas. at 210.

[45] *Id.* at 563, 18 FEP Cas. at 209.

[46] Love v. Pullman, 404 U.S. 522 (1972).

[47] *See* 29 C.F.R. § 1601.13 (1979).

[48] *Contra, White*, 581 F.2d at 563-64, 18 FEP Cas. at 209-10 (Hill, J., dissenting). See also note 44 *supra*.

action was required. White understandably relied on the EEOC to either handle her complaint or to defer it to any appropriate state agency, as it was required to do by its own regulations. The EEOC never notified White that her claim was insufficient in any way or that it needed to be referred to another authority.

Although the EEOC has been authorized by the Supreme Court to defer claims to state and local agencies which are sent directly to the Commission, the prudent practitioner should file directly with both the appropriate local agency and the EEOC. The invalidation by the *White* court of the EEOC regulation requiring registration of deferral agencies will decrease the ability of the EEOC to recognize all state and local deferral agencies which satisfy the requirements of section 706. As a result, the fair employment practitioner will be in a better position to identify the appropriate local deferral agency. Although the *White* court did not punish the charging party for her reliance upon the supposed expertise of the EEOC, not all courts may be as sympathetic to the practitioner who relies on the EEOC to fulfill requirements which are best fulfilled by her.

C. *Employer Retaliation*

1. *"Opposition Clause":* Sias v. City Demonstration Agency, City of Los Angeles

Employees who exercise their rights under Title VII are protected by that statute against retaliation by employers.[1] This ability to oppose illegal employment practices without fear of retaliation is basic to carrying out the purpose of Title VII. What has not been clear, however, is the extent to which the statute protects individuals who, through informal complaints, oppose alleged discrimination which later is found not to exist. On its face, Title VII distinguishes an employee's informal "opposition" to presumed unlawful practices from an employee's "participation" in an official EEOC investigation.[2] One reading of the relevant langauge suggests that, in the absence of a formal investigation, an employee risks retaliation by opposing an employment practice which ultimately is found to be legal.[3] During the *Survey* year the United States Court of Appeals for the Ninth Circuit in *Sias v. City Demonstration Agency, City of Los Angeles*[4] held that the protection against employer retaliation afforded employees who participate in formal investigations should cover informal opposition as well, provided that the employee

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[1] *See* 42 U.S.C. § 2000e-3(a) (1976) which provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . [1] because he has *opposed* any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.

(emphasis added).

[2] *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 416-33 (1976). See also note 1, *supra*.

[3] *See, e.g.*, EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 305-06, 10 FEP Cas. 1131, 1134-35 (M.D. Ga. 1975).

[4] 588 F.2d 692, 18 FEP Cas. 981 (9th Cir. 1978).

reasonably believes that unlawful discrimination has occurred.[5] In doing so the Ninth Circuit extended the retaliation protection of Title VII beyond its facial limits to include unfounded, albeit "reasonable," informal accusations of discrimination.

In *Sias*, an employee was discharged for his repeated informal objection to alleged racially discriminatory employment practices.[6] The employee complained that the employer ignored his talents and failed to serve minority interests in the community. These complaints were made primarily to fellow workers and supervisors, but twice were taken to local and federal officials in charge of programs administered by the employer.[7] Charging unlawful discrimination, the employee eventually sued in federal court seeking back pay and reinstatement. The district court found the evidence sufficient to support the employee's claim of retaliatory discharge.[8] On appeal the employer did not deny that the employee was discharged for his opposition to certain employment practices, but instead contended that Title VII affords no protection from such retaliation unless the practices complained of are found to be illegal.[9] The United States Court of Appeals for the Ninth Circuit rejected this argument[10] and held that even informal opposition to perceived discrimination must not be chilled by fear of retaliation. A mere reasonable belief that unlawful discrimination exists, the court held, is sufficient to invoke the statutory protection against retaliation.[11]

By its terms the retaliation provision of Title VII protects employees who either "oppose" unlawful employment practices, or who "participate" in formal investigations of alleged discrimination.[12] The so-called "participation clause"[13] has been held to protect employees from retaliation regardless of the ultimate merit of the charge filed with the EEOC.[14] This result is necessary in order to permit adequate investigation of alleged discrimination.[15] The "opposition clause,"[16] however, applies in the absence of formal charges and

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[5] *Id.* at 695-96, 18 FEP Cas. at 982-83.

[6] *Id.* at 693-94, 18 FEP Cas. at 981-82.

[7] Sias v. City Demonstration Agency, Nos. 77-2390, 77-2624, 18 FEP Cas. 979 (C.D. Cal. 1977).

[8] *Id.* at 980. The district court did not consider whether the complaints were grounded in fact, but found only that Sias' discharge "had definite racial implications." *Id.*

[9] 588 F.2d at 693-94, 18 FEP Cas. at 981.

[10] *Id.* at 695-96, 18 FEP Cas. at 982-83.

[11] *Id.*

[12] See note 1, *supra*. See also B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 416-18 (1976).

[13] This is the clause following the bracketed numeral [2] in the quotation at note 1, *supra*.

[14] Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1007, 1 FEP Cas. 752, 758 (5th Cir. 1969).

[15] *See id. See also* EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66, 72, 11 FEP Cas. 241, 244-45 (S.D.N.Y. 1975). As a matter of common sense, it is easy to see that employees may hesitate to come forward with complaints and testimony when the risk of being wrong must be borne entirely by them.

[16] This is the clause immediately following the bracketed numeral [1] in the quotation at note 1, *supra*.

is at first glance more narrow in scope. An employee is protected under this clause when "he has opposed any practice made an unlawful employment practice by Title VII."[17] A technical argument can thus be made that "opposition" protected applies only when the opposed practice actually is found to be unlawful, and that an employee is not entitled to protection in the absence of such a finding. Nevertheless, this construction of the statute was rejected by the court of appeals in *Sias.*[18] The *Sias* court first dismissed the legislative history of the opposition clause as not controlling.[19] With this freedom the court then held that a liberal construction of the retaliation provision was proper, and that the purpose of eliminating employment discrimination is best served by protecting informal opposition to perceived discrimination so long as the perception of discrimination is reasonable.[20]

In reaching its result, the Ninth Circuit referred to the recent district court decision in *Hearth v. Metropolitan Transit Commission.*[21] In *Hearth,* several men had opposed informally a hair length regulation which was applied unevenly to male and female employees. They contended that their subsequent suspension occurred in retaliation for their opposition to the hair length regulation.[22] Although the district court acknowledged that the initial opposition to the hair length requirement was meritless,[23] it nevertheless held that the employees were entitled to prove that their suspension was an unlawful retaliation against the exercise of protected rights.[24] The court in *Hearth* explained its decision as follows:

> This court believes that appropriate informal opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist. . . . When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.[25]

This language was adopted by the Ninth Circuit in *Sias* to explain its expansive interpretation of the opposition clause.[26]

As recognized by both the *Sias* and *Hearth* courts, strong policy arguments support a broad interpretation of Title VII's opposition clause. A contrary result would tend to discourage informal resolution of employees' grievances and would encourage the filing of formal charges whenever discrimination is alleged since employees, after registering informal complaints, would be vulnerable to retaliation in the event that unlawful discrimination is not

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[17] 42 U.S.C. § 2000e-3(a) (1976), set out at note 1, *supra.*

[18] 588 F.2d at 695, 18 FEP Cas. at 982.

[19] *Id.* at 695 n.4, 18 FEP Cas. at 983 n.4.

[20] *Id.* at 695, 18 FEP Cas. at 983.

[21] 436 F. Supp. 685, 18 FEP Cas. 329 (D. Minn. 1977).

[22] *Id.* at 686-87, 18 FEP Cas. at 329-30.

[23] *Id.* at 687, 18 FEP Cas. at 330.

[24] *Id.* at 688-89, 18 FEP Cas. at 331-32. The court did so by refusing to grant summary judgement for the employer on the retaliation issue.

[25] *Id.* at 688-89, 18 FEP Cas. at 331.

[26] 588 F.2d at 695, 18 FEP Cas. at 982-83.

shown.[27] This increase in formal complaints would burden already crowded EEOC channels. In addition, certain potential meritorious attempts at informal resolution might altogether be chilled into non-existence by the threat of retaliation. Despite the Ninth Circuit's fundamentally sound reasoning, however, the *Sias* opinion may be justly criticized for failing to consider the issue from the employer's perspective as well.

Sias, the employee, ultimately was discharged for writing a letter to federal authorities who were probably in a position to apply fiscal pressure to the city agency for which Sias worked.[28] In this letter Sias charged his employer with racial discrimination. In doing so Sias was apparently attempting to pressure his employer into acting upon his unfounded claim of discrimination. It is unlikely that such "end run" tactics truly represent the desirable form of informal dispute resolution intended by Title VII and promoted by the Ninth Circuit. While it is reasonable to encourage employers and employees to attempt informally to resolve differences, it is not reasonable to endorse behavior which is unlikely to result in a mutually acceptable solution, but instead has as its purpose the coercion of employers into premature compromise with respect to perfectly legal activity.[29] In this regard it should be emphasized that, by its terms, the opposition clause only protects opposition to "unlawful" activity,[30] and that the judicial broadening of this protection to include opposition to lawful activity is properly justified only insofar as the purposes of Title VII are effectuated. Title VII should not be read to immunize employees who would use the protection from retaliation to harass employers, certainly not in the absence of any illegality. The formal EEOC mechanism established by Title VII for resolving questions of discrimination implies that at some point accusations should not be permitted to proliferate, but instead should be formally resolved or else discontinued.[31] The EEOC offers the proper forum for such formal resolution, and routine circumvention of its procedures does not appear proper.[32] Straightforward informal dispute res-

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[27] *See id.*

[28] *Id.* at 694, 18 FEP Cas. at 982. *See also* Sias v. City Demonstration Agency, Nos. 77-2390, 77-2624, 18 FEP Cas. 979, 980 (C.D. Cal. 1977).

[29] *Cf.* EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 305, 10 FEP Cas. 1131, 1135 (M.D. Ga. 1975) ("On the other hand, accusations of racism ought not be made lightly. Unfounded accusations might well incite racism where none had previously existed.").

[30] *See* 42 U.S.C. § 2000e-3(a) (1976), set out at note 1, *supra*.

[31] *See* EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 305-06, 10 FEP Cas. 1131, 1135 (M.D. Ga. 1975).

[32] *See id.* at 306, 10 FEP Cas. at 1135 where the court stated:

> [T]he only reasonable interpretation to be placed on Section 704(a) [the retaliation provision] is that where accusations are made in the context of charges before the EEOC, the truth or falsity of that accusation is a matter to be determined by the EEOC, and thereafter by the courts. However, where accusations are made outside the procedures set forth by Congress that accusation is made at the accuser's peril. In order to be protected, it must be established that the accusation is well-founded. If it is, there is, in fact, an unlawful employment practice and he has the right, protected by Section 704(a), to oppose it. However, where there is no underlying unlaw-

olution is a desirable goal and should be encouraged. Devices with other, questionable purposes, however, should not receive automatic protection. It therefore may be argued that if informal resolution is the goal in *Sias*, the court's holding in that case should have been better tailored to serve its purpose.

The Ninth Circuit did require that employees maintain a reasonable belief that unlawful employment practices exist in order to be protected from retaliation,[33] and, furthermore, an employee's actual exercise of the right to charge discrimination always must be reasonable.[34] These considerations, if applied equitably as between employers and employees, should provide some consolation to employers who might fear groundless accusations of discrimination. What is clear is that these questions of reasonableness are henceforth the primary source of defense available in the Ninth Circuit for employers charged under Title VII with retaliation against informal opposition. The more basic impact of the *Sias* decision is its effect on the risks which employees associate with informal opposition to discriminatory employment practices. To the extent that these risks are lessened, employees will be more likely to speak out. The Ninth Circuit in *Sias* has noticeably reduced this perceived risk and has therefore encouraged informal dispute resolution. Because satisfactory informal dispute resolution is always preferred over formal proceedings, this result can be seen as desirable from the viewpoints of both employee and employer. Nevertheless, in the future more attention should be given to the employer's side of the question, either through more deliberate evaluation of how the employee's behavior is justified by the goal of informal resolution or through development of clear standards of reasonableness against which such behavior may be judged.

II. Religious Discrimination

A. *Union Dues*

The Supreme Court has interpreted a 1972 amendment to Title VII as requiring employer accommodation of an employee's religious observances where such accommodation would not result in an undue hardship to the employer's business.[1] The same reasonable accommodation is required of

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ful employment practice the employee has no right to make that accusation in derogation of the procedures provided by the statute.

Id.

[33] 588 F.2d at 695-96, 18 FEP Cas. at 983. The *Sias* court considered a finding of reasonableness in the employee's behavior to be implicit in the lower court's ruling. *Id.*

[34] *See* Hochstadt v. Worcester Foundation, 545 F.2d 222, 230-33, 13 FEP Cas. 804, 809-12 (1st Cir. 1976).

[1] *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977). The amendment is codified at 42 U.S.C. § 2000e(j) (1976), and is actually just a redefinition of the term "religion" as used in Title VII. It provides:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to

unions.[2] In several cases[3] decided during the *Survey* year, among them *Anderson v. General Dynamics Convair Aerospace Division*,[4] this amendment was held to provide relief for employees who were discharged for religion-based refusals to pay union dues, after the employer and union had failed to attempt reasonable accommodation of the employee's beliefs.[5] This result, particularly in *Anderson*, is significant because it imposes upon Title VII employers[6] the duty to propose accommodation to such employees once a prima facie case of discrimination is raised, and because it rejects the absolutist view that union shop agreements inevitably must prevail over personal religious observances.

In *Anderson*, a Seventh Day Adventist refused for religious reasons[7] to join or contribute to a union. The employer-defendant, General Dynamics, recently had entered into a new collective bargaining agreement with the co-defendant local lodge of the International Association of Machinists and Aerospace Workers. The new contract contained a union shop clause requir-

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reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

For the history of this provision, *see* Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163, 168 n.9, 12 FEP Cas. 1549, 1552 n.9 (5th Cir. 1976).

The basic constraining language of Title VII is found in 42 U.S.C. § 2000e-2(a) (1976). It provides, in relevant part:

> It shall be an unlawful employment practice for an employer (1) . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

[2] *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400, 17 FEP Cas. 1644, 1646 (9th Cir. 1978); McDaniel v. Essex Int'l, Inc., 571 F.2d 338, 344, 16 FEP Cas. 904, 907 (6th Cir. 1978). Title VII expressly addresses union as well as employer discrimination. 42 U.S.C. § 2000e-2(c) (1976). For a view that the accommodation obligation does not extend to unions, *see* Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163, 170-71, 12 FEP Cas. 1549, 1554-55 (5th Cir. 1976) (opinion of Gee, J.).

[3] Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397, 17 FEP Cas. 1644 (9th Cir. 1978); McDaniel v. Essex International, Inc., 571 F.2d 338, 16 FEP Cas. 904 (6th Cir. 1978); Burns v. Southern Pacific Transp. Co., 589 F.2d 403, 17 FEP Cas. 1648 (9th Cir. 1978). *See also* Maine Human Rights Commission v. Local No. 1361, 383 A.2d 369, 17 FEP Cas. 347 (Me. 1978) (involving state law).

[4] 589 F.2d 397, 17 FEP Cas. 1644 (9th Cir. 1978).

[5] *See, e.g., id.* at 402, 17 FEP Cas. at 1647-48. FEP Cas. 1098, 1099 (6th Cir. 1977) (without new discussion of the constitutional question); Gavin v. Peoples Natural Gas Company, 464 F. Supp. 622, 626-33, 18 FEP Cas. 1431, 1434-39 (W.D. Pa. 1979) (finding that the court could not constitutionally engage in an evaluation of the employee's asserted beliefs, thus refusing to enforce Title VII for constitutional reasons). Yott v. North American Rockwell Corp., 428 F. Supp. 763, 765-67, 14 FEP Cas. 256, 262 (5th Cir. 1970).

[6] *See* 42 U.S.C. § 2000e(b) (1976).

[7] The basic objection held by members of this faith is the belief that man is a free moral agent who should seek the remedy for social problems not in organized controversy or argument, but on an individual level. *See* Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1064, 1066-67 n.4, 9 FEP Cas. 256, 258 n.4 (5th Cir. 1970). If religious beliefs are sincerely held, it is generally beyond the scope of judicial authority to evaluate their relative merit. *See* United States v. Seeger, 380 U.S. 163, 184-85 (1965).

ing union membership of all employees in the collective bargaining unit.[8] Although Anderson was willing to donate to charity in lieu of dues payment to the union,[9] he refused either to join the union or to pay that amount to the union for charitable purposes.[10] Upon the union's request, Anderson was discharged by General Dynamics for this refusal.[11] Neither the union nor General Dynamics offered Anderson any alternative or accommodation with respect to joining the union.[12]

Anderson exhausted his administrative remedy[13] and then brought suit in federal court. He challenged his discharge on the grounds that failure reasonably to accommodate his religious beliefs constituted religious discrimination in violation of Title VII.[14] The union and employer argued that non-payment of dues by an employee receiving the benefits of bargaining improperly creates a "free rider," thereby making reasonable accommodation impossible. After a trial on the merits, the United States District Court entered judgment in favor of the union and employer.[15] The district court held that Anderson's refusal to support the union did make reasonable accommodation impossible, thus creating an undue hardship as a matter of law.[16] The Court of Appeals for the Ninth Circuit reversed.[17] The appellate court held that the initial burden of proposing accommodation fell on the union and the employer, and that since no accommodation was attempted they had failed to prove that accommodation would result in undue hardship.[18]

If union security agreements always were to prevail over religious beliefs, an employee would be placed in the difficult position of choosing between his beliefs and his employment. On the other hand, if employees could routinely avoid supporting unions from whose bargaining activities they benefit, the congressional policy favoring viable unions would be undermined.[19] The balance between these interests appears to have been struck by Title VII.[20]

In *Anderson*, the union incorrectly assessed its obligation to accommodate under Title VII. Rather than attempting to accommodate Anderson, the union asserted that Anderson himself had failed to propose a satisfactory

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[8] 589 F.2d at 399, 17 FEP Cas. at 1645. Such clauses are authorized by the National Labor Relations Act (NLRA). 29 U.S.C. § 158(a)(3), (b)(2) (1976).

[9] *See* 589 F.2d at 399, 401, 17 FEP Cas. at 1645, 1647. This solution (payment to charity instead of the union) is expressly adopted in the NLRA in the case of employees in health care institutions. 29 U.S.C. § 169 (1976).

[10] 589 F.2d at 399, 401, 17 FEP Cas. at 1645, 1647.

[11] *Id.* at 399, 17 FEP Cas. at 1645.

[12] *Id.*

[13] *Id.* This involved receiving a right to sue letter from the local EEOC office after EEOC attempts at conciliation had failed.

[14] For the relevant provisions, see note 1 *supra*.

[15] 430 F. Supp. 418, 422, 14 FEP Cas. 667, 670 (S.D. Cal. 1977).

[16] *Id.*

[17] 589 F.2d at 403, 17 FEP Cas. at 1648.

[18] *Id.* at 402, 17 FEP Cas. at 1647.

[19] This congressional policy is expressed in the union security provisions of the NLRA which authorize union shop agreements. See note 8 *supra*. *See also* McDaniel v. Essex Int'l, Inc., 571 F.2d 338, 342-43, 16 FEP Cas. 904, 906-07 (6th Cir. 1978).

[20] *See Anderson*, 589 F.2d at 400-01, 17 FEP Cas. at 1646.

accommodation—namely, payment to the union for charitable purposes of a sum equal to union dues—thereby excusing the union's own obligation to accommodate.[21] The court of appeals rejected this attempt to shift the accommodation obligation to the employee, and held that any inadequacies in the employee's suggested accommodation (payment to a charity of the *employee's* choice) would not relieve the employer and union of their obligation reasonably to accommodate.[22]

The union also argued that the non-payment of union dues creates an undue hardship as a matter of law, and thus prevents any reasonable accommodation from being possible.[23] This argument relies heavily on the policy behind the union security provisions of the National Labor Relations Act which authorize mandatory union membership.[24] It is rooted in the notion that the creation of "free riders"[25] weakens unions by allowing some employees to receive the benefits of union membership without paying for them. The court of appeals rejected this argument on grounds that the union's reliance on the general sentiment against "free riders," absent more specific proof of hardship, was insufficient to prove that such hardship would result.[26] The court said that undue hardship cannot be proved by hypothetical assumptions or opinions, or simply by allegations that dues-paying union members might protest paying slightly more than their share of union expenses.[27] Since the union and employer had failed to make a more specific showing, the court held that their burden of proof had not been met and therefore reversed the district court's judgment which had reached the opposite conclusion.[28]

In reaching its result, the *Anderson* court referred to the recent Sixth Circuit decision of *McDaniel v. Essex International, Inc.*,[29] where that court reversed a summary judgment for a union and employer under circumstances almost identical to those in *Anderson*. McDaniel, the employee, had requested accommodation from the union and employer, but had received no response. Like Anderson, she had proposed to pay dues to charity in lieu of the union.[30] Therefore the issue in *McDaniel* was essentially the same as that in

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[21] *Id.* at 401, 17 FEP Cas. at 1647.

[22] *Id.* The court of appeals stated that, "[t]he burden was upon the [company and union], not Anderson, to undertake initial steps toward accommodation."

[23] *See id.*

[24] See note 8 *supra*. *See also* S. REP. No. 105, 80th Cong., 1st Sess. 7 (1947) (hearings on S. 1126).

[25] It can be argued that an employee like Anderson who offers to pay dues to charity instead of the union does not exactly qualify as a free rider because he is still required to make a financial sacrifice in order to remain employed. *See* Maine Human Rights Comm'n v. Local No. 1361, 383 A.2d 369, 379, 17 FEP Cas. 347, 355 (Me. 1978).

[26] 589 F.2d at 402, 17 FEP Cas. at 1647-48.

[27] *Id.*

[28] *Id.* The district court opinion appears at 430 F. Supp. 418, 14 FEP Cas. 667 (S.D. Cal. 1977).

[29] 571 F.2d 338, 16 FEP Cas. 904 (6th Cir. 1978).

[30] *Id.* at 340, 16 FEP Cas. at 905.

Anderson, namely whether non-payment of dues by a religious objector results in undue hardship as a matter of law to the union.[31] The *McDaniel* court held that undue hardship must appear as a matter of fact in the record, and that the asserted hardship as a matter of law in that case was only speculative and hence was insufficient to justify summary judgment.[32]

The outcome of *Anderson* depends in significant part on the court's allocation of burdens of proof. The plaintiff, in order to establish a prima facie case of discrimination, is required to prove (1) that he holds a bona fide religious belief against union support; (2) that he has so informed his employer; and (3) that he was discharged on the basis of this objection.[33] Once this proof is provided, the burden shifts to the employer and union to attempt reasonably to accommodate the employee's beliefs. In *Anderson*, the employer and union failed to meet this burden. They failed to take initial steps toward accommodation, and they relied incorrectly on an asserted but unproved hardship.

In a companion case, *Burns v. Southern Pacific Transportation Co.*,[34] the *Anderson* court was more specific as to what proof is necessary to excuse an employer and union when faced with a prima facie case of such religious discrimination. In *Burns*, an employee was threatened with discharge under circumstances very similar to those in *Anderson*.[35] And, as in *Anderson*, the court of appeals held in favor of the employee.[36] The court said that once a prima facie case of religious discrimination under Title VII has been established, the burden falls on the union and employer to prove (1) that they made good faith efforts to accommodate the employee's beliefs; (2) that the efforts were unsuccessful; and (3) that they were unable reasonably to accommodate those beliefs without undue hardship.[37]

To determine what constitutes an undue hardship, the *Burns* court referred to the recent Supreme Court case of *Trans World Airlines, Inc. v. Hardison*.[38] In *Hardison*, the Supreme Court held that undue hardship is demonstrated when the untoward impacts of accommodation on business operation are greater than *de minimis*.[39] The proof of hardship provided by the employer and union in *Burns* alleged undesirable dissent among employees resulting from the allowance of "free riders," and financial hardship resulting not only from nonreceipt of the objecting employee's dues but also from re-

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[31] *See id.* at 341, 16 FEP Cas. at 906.

[32] *Id.* at 343-44, 16 FEP Cas. at 907-08.

[33] 589 F.2d at 401, 17 FEP Cas. at 1646.

[34] 589 F.2d 403, 17 FEP Cas. at 1648 (9th Cir. 1978).

[35] *Id.* at 405, 17 FEP Cas. at 1649-50. The union contract in *Burns* was governed by section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1976), rather than the NLRA, but this has no effect on the outcome or principle of the case. *Id.* at 406 n.1, 17 FEP Cas. at 1650 n.1.

[36] *Id.* at 407-08, 17 FEP Cas. at 1651.

[37] *Id.* at 405, 17 FEP Cas. at 1649-50.

[38] 432 U.S. 63 (1977).

[39] *Id.* at 84.

cording the employee's alternative payments to charity.[40] The court deemed both of these alleged hardships *de minimis*.[41]

As in *Anderson* and *McDaniel*, the court in *Burns* viewed the asserted dissent among employees as merely speculative, and thus as insufficient to establish the concrete form of demonstrable hardship required.[42] This suggests that employee unrest must be proved, if at all, by actual experience after accommodation has been implemented because any forecast of unrest necessarily would be speculative. Such an approach would impose on employers and unions at least the responsibility to attempt accommodation, with the availability of a hardship defense to await the experience gained from accommodation.[43]

The *Burns* court viewed the asserted financial hardship arising from the absence of the employee's dues as merely *de minimis*, and thus, under *Hardison*, as insufficient to relieve the union and employer of their obligation to accommodate.[44] This was so even though other union members would have to supplant the objecting employee's dues. The court rejected as speculative the contention that accommodating one employee would excuse non-payment by many others and would therefore produce a greater than *de minimis* burden on the union.[45] The court pointed out that if such advantage were taken of the union in the future, undue hardship could then be proved.[46] It is clear, then, that at least in this context the *Hardison "de minimis"* test should be taken lightly by employers and unions.

Without the statutory remedy provided by Title VII it seems clear that the employees in *Anderson*, *McDaniel* and *Burns* would not have been entitled to relief. The only other available claim would have to be based on an alleged violation of first amendment religious freedom, and the balance between union dues and religious freedom in the constitutional area has been struck in favor of the union security provisions of the national labor laws.[47] There may be future constitutional challenges brought by unions and employers against the religious accommodation requirements of Title VII.[48] Such

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[40] 589 F.2d at 406-07, 17 FEP Cas. at 1650-51.

[41] *Id.* at 407, 17 FEP Cas. at 1651.

[42] *Id.* at 406-07, 17 FEP Cas. at 1650-51.

[43] *See id.*

[44] *Id.* at 407, 17 FEP Cas. at 1651. There was testimony from one union official upon which the appellate court seemed to rely to the effect that the loss of the employee's nineteen dollars per month would not affect the union "at all." *Id.*

[45] *Id.*

[46] *Id.* at 407 & n.3, 17 FEP Cas. at 1651 & n.3.

[47] *See* Yott v. North American Rockwell Corp., 501 F.2d 398, 404, 8 FEP Cas. 546, 550-51 (9th Cir. 1974); Linscott v. Millers Falls Co., 440 F.2d 14, 17-18, 9 FEP Cas. 266, 267-69 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); Gray v. Gulf, Mobile, and Ohio Railroad, 429 F.2d 1064, 1072, 9 FEP Cas. 256, 262 (5th Cir. 1970).

[48] Such a challenge was raised for the first time on appeal by the union and employer in *Burns*, but was not decided due to its improper procedural timing. 589 F.2d at

claims would assert a violation of the establishment clause of the first amendment under the theory that the government is sanctioning religious observances by requiring accommodation where there has been no intentional discrimination. Meanwhile, however, it seems that the obligation of an employer and union under Title VII to accommodate religious observance is substantial. Under the holdings in *Anderson*, *McDaniel* and *Burns*, the employer and union are under an affirmative obligation to reconcile an employee's religious observances with business necessity, or to carry the formidable burden of proving that no reasonable reconciliation is possible.

III. Remedies

A. *Attorney's Fees*

1. *Definition of "Prevailing Party"*: Harrington v. Vandalia-Butler Board of Education

Under American common law a successful litigant cannot recover attorney's fees as part of an award of damages.[1] Although exceptions to this rule exist, as when the losing party acts in bad faith,[2] attorney's fees ordinarily are recoverable only if authorized by statute.[3] One such statutory authorization is section 706(k) of Title VII of the Civil Rights Act of 1964.[4] Section 706(k)

407-08, 17 FEP Cas. at 1651. *See also* Trans World Airlines v. Hardison, 432 U.S. 63, 70 (1977) (finding the question unnecessary to decide); Cummins v. Parker Seal Company, 516 F.2d 544, 551-54, 10 FEP Cas. 974, 980-83 (6th Cir. 1975) (upholding the constitutionality of the definition and the accommodation requirement), *vacated* 433 U.S. 903, 15 FEP Cas. 31 (1977) (apparently on other grounds), *aff'd on remand* 561 F.2d 658, 659, 15 FEP Cas. 1098, 1099 (6th Cir. 1977) (without new discussion of the constitutional issue); Yott v. North American Rockwell Corp., 428 F. Supp. 763, 765-67, 14 FEP Cas. 445, 447-49 (C.D. Cal. 1977) (finding the new statutory definition of religion to be unconstitutional).

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[1] Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 247-61 (1975). Justice White includes a thorough discussion of the development of the law in this area. *Id.* at 247-61.

[2] *Id.* at 258. In some circumstances a contractual provision for attorney's fees is enforceable. Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967). Two other exceptions recognized in some jurisdictions are the "common fund doctrine" and the "substantial benefit rule." The first may be invoked when a number of persons are entitled in common to a specific fund of money and an action brought by plaintiff results in its recovery or preservation. Trustees of International Improvement Fund v. Greenough, 105 U.S. 527, 537 (1881). The substantial benefit rule applies where a shareholder's derivative action or where a class action results in the conferral of a substantial benefit, monetary or otherwise, to defendant. In these circumstances the defendant may be required to yield some of these benefits in the form of an award of attorney's fees to the successful plaintiff. *See* Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).

[3] 421 U.S. at 260.

[4] Section 706(k), 42 U.S.C. 2000e-5(k) (1976) provides:

> In any action or proceeding under this sub-chapter the court, in its discretion, may allow the prevailing party, other than the Commissioner or the United States, a reasonable attorney's fee as part of the costs, and the

allows a court, in its discretion, to award reasonable attorney's fees to a prevailing party in employment discrimination suits.[5]

While section 706(k) of Title VII permits a federal district court to exercise such discretion, the statute does not contain criteria for deciding 1) the standard to be utilized by courts in exercising their discretion to award attorney's fees to defendants; 2) the standard to be utilized in awarding attorney's fees to plaintiffs; and 3) what a litigant must show to be a "prevailing party."

The Supreme Court addressed the first issue during the previous *Survey* year in *Christianburg Garment Co. v. EEOC*.[6] There the Court held that a prevailing defendant should be awarded attorney's fees only when the district court finds that the plaintiff's claim was frivolous, unreasonable, groundless, or that the plaintiff continued to litigate after the claim became so.[7] In so holding, the Supreme Court pointed out that this was a much stricter standard than the criteria it had articulated in *Albemarle Paper Co. v. Moody*[8] for awarding attorney's fees to prevailing plaintiffs. In *Albemarle Paper* the Supreme Court transported the standard under Title II of the Civil Rights Act that it had enunciated in *Newman v. Piggie Park Enterprises, Inc.*[9] to the Title VII field.[10] The appropriate standard for prevailing plaintiffs, the *Albemarle* Court held, was that attorney's fees should be awarded "unless special circumstances would make the award unjust."[11]

These differing standards reflect one of the underlying purposes of the statute: to encourage private enforcement of the federal policy to eliminate employment discrimination.[12] In these decisions the Supreme Court has implicitly revealed certain elements regarding what one must show to be a prevailing party. While ordinarily every lawsuit contains a prevailing party, it would be inconsistent with federal policy to permit every prevailing defendant to recover his attorney's fees. The standards of discretion established by the Supreme Court do not address the issue of what a *plaintiff* must show to be a "prevailing party." During the *Survey* year the Sixth Circuit considered this issue in *Harrington v. Vandalia-Butler Board of Education*.[13]

The plaintiff in *Harrington* was a woman who had formerly taught physical education in the Vandalia-Butler School District.[14] Prior to the suit, she

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Commissioner and the United States shall be liable for costs the same as a private person.

[5] *Id.*

[6] 434 U.S. 412 (1978).

[7] *Id.* at 422. For a full discussion of *Christianburg see 1977-1978 Annual Survey of Labor Relations and Employment Discrimination Law, V. Remedies–Attorney's Fees*, 20 B.C. L. Rev. 216 (1978).

[8] 422 U.S. 405 (1975).

[9] 390 U.S. 400, 402 (1968).

[10] 422 U.S. at 415.

[11] *Id.*

[12] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); Carrion v. Yeshiva Univ., 563 F.2d 722, 727, 13 FEP Cas. 1521, 1525 (2d Cir. 1976).

[13] 585 F.2d 192, 197, 18 FEP Cas. 348, 352 (6th Cir. 1978).

[14] *Id.* at 194, 18 FEP Cas. at 349.

had elected to accept a voluntary disability retirement instead of a transfer to teach a different subject in another junior high school.[15] Mrs. Harrington alleged that the defendant Vandalia-Butler Board of Education (Board) had intentionally discriminated against her by providing working conditions inferior to those provided male physical education instructors.[16] The evidence of disparity in working conditions ranged from substantial inferiority in the facilities for instruction of girls' physical education,[17] to inferiority in the quality of the offices provided for her as opposed to her male counterparts.[18] To show the Board's intent to discriminate, the plaintiff presented, in addition to the differences just noted, evidence that when a male teacher taught a girls' gym class, the class would be assigned to the modern field house where the boys' classes were normally taught and not to the girls' gym.[19]

The district court held that Mrs. Harrington had established intentional discrimination by the Board,[20] that such discrimination violated Title VII,[21] and that as a result she was entitled to compensatory damages of $6,000.[22] Moreover, the court concluded that, as the prevailing party, plaintiff was entitled to an award of attorney's fees of $2,000—the reasonable cost of bringing her suit.[23] In reaching the decision to award compensatory damages, Judge Rubin relied upon general notions of jurisprudence regarding the duty of federal courts to fashion remedies to protect federally created rights.[24]

On appeal the Sixth Circuit reversed the awards of compensatory damages and attorney's fees.[25] The appellate court noted the trial court's finding that the Board had discriminated against Mrs. Harrington.[26] Nevertheless, after carefully construing section 706(g) of Title VII[27] which provides explicit

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[15] *Id.*, 18 FEP Cas. at 349-50.

[16] *Id.*, 18 FEP Cas. at 350.

[17] *Id. See also* Harrington v. Vandalia-Butler Board of Education, 418 F. Supp. 603, 605-07, 13 FEP Cas. 702, 703-04 (S.D. Ohio 1976).

[18] 585 F.2d at 193-94, 18 FEP Cas. at 349.

[19] *Id.* The girls' gym was poorly lit, and was on two levels making it difficult to supervise a class. 418 F. Supp. at 605, 13 FEP Cas. at 703.

[20] 418 F. Supp. at 606, 13 FEP Cas. at 704.

[21] *Id.*

[22] *Id.* at 607, 13 FEP Cas. at 705.

[23] *Id.*

[24] *Id.* Judge Rubin relied on Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Albemarle* Court, citing Bell v. Hood, 327 U.S. 678, 684 (1946) with approval, stated "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 422 U.S. at 418.

[25] 585 F.2d at 197, 18 FEP Cas. at 352.

[26] *Id.* at 193, 18 FEP Cas. at 352.

[27] 42 U.S.C. § 2000e-5(g) (1976). Section 706(g) provides in relevant extract:

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
>
> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such

remedies, the court held that Congress did not intend to authorize the recovery of compensatory damages in employment discrimination cases.[28] The court then concluded that, since Mrs. Harrington had not been entitled to any remedy permitted by the statute, she was not a prevailing party and so could not be awarded attorney's fees.[29]

The court began by noting that section 706(g), by its terms, allows such remedies as reinstatement, injunction of the particular unlawful practice involved, awards for back wages, and "any other equitable relief as the court deems appropriate."[30] The appeals court went on to analyze compensatory damages[31] and cited extensively the reasoning of a previous Sixth Circuit decision, *EEOC v. Detroit Edison Co.*[32] In *Detroit Edison* the Sixth Circuit had ruled that, under the doctrine of *ejusdem generis*, the catch-all phrase "any other equitable relief" was limited to the same kinds of relief otherwise established by section 706(g) and, therefore, remedies at law such as punitive damages cannot be granted.[33] The *Harrington* court then examined the legislative history of section 706(g) to determine if compensatory damages were within the scope of Congress' intent in enacting Title VII.[34]

The telling point for the *Harrington*[35] court was the similarity of § 706(g) to the relief provisions of the NLRA.[36] Not only was section 706(g) modeled on the relief provisions of the NLRA, but the sponsoring Senators, in introducing and explaining the Civil Rights Bill, asserted that relief under Title VII was similar to that available under the NLRA.[37] The court concluded that since neither punitive damages nor compensatory damages are allowed under the NLRA,[38] these remedies are not available under Title VII either.[39] Having ruled that Mrs. Harrington was not entitled to compensatory damages,[40] the court then held that she could not be a prevailing party and so could not receive attorney's fees.[41] The court reasoned that to be a "prevailing party" a plaintiff must have been entitled to some form of relief at the time suit was filed.[42] Thus, despite receiving a judicial determination that the defendant

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unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

[28] 585 F.2d at 194, 18 FEP Cas. at 350.

[29] *Id.* at 198, 18 FEP Cas. at 352.

[30] *Id.* at 194, 18 FEP Cas. at 350.

[31] *Id.*

[32] 515 F.2d 301, 10 FEP Cas. 239, *amended in part*, 10 FEP Cas. 1063 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977).

[33] 515 F.2d at 308-09, 10 FEP Cas. at 243-44.

[34] 585 F.2d at 194-95, 18 FEP Cas. at 350-51.

[35] 585 F.2d 192, 18 FEP Cas. at 348.

[36] *Id.* at 197, 18 FEP Cas. at 351.

7214 (remarks of Senator Clark).

[38] *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938).

[39] 585 F.2d at 197, 18 FEP Cas. at 351.

[40] *Id.* at 197, 18 FEP Cas. at 352.

[41] *Id.*

[42] *Id.*

had discriminated against her,[43] Mrs. Harrington was not a prevailing party because she was not entitled to any of the statutory remedies nor to an award of damages.[44]

The Sixth Circuit addressed two issues of law in *Harrington*: whether it is appropriate to award compensatory damages in Title VII cases, and what a plaintiff must establish to be a prevailing party for purposes of awarding attorney's fees. Both issues required the court to divine congressional purpose in enacting various provisions of Title VII, and both required the court to tread a fine line between encouraging meritorious suits and discouraging meritricious suits in keeping with federal policy. The issue of awarding compensatory damages is essentially a question relating to the judicial inference of remedies from a federal statute—the "implication doctrine."[45] While it is unnecessary here to examine all of the niceties of this doctrine, the impact of recent Supreme Court decisions on the implication of remedies in the employment discrimination area is worth noting.

For purposes of implying private remedies, the Supreme Court distinguishes cases affecting civil rights[46] from cases concerning only economic rights.[47] It is clear that this distinction does not form a perfect dichotomy and that employment discrimination cases may often be in both categories. While employment rights are certainly related to the economic area, the stronger analogy is to the civil rights area since employment discrimination is one of the most pernicious forms of impermissible discrimination under the Civil Rights Act.[48] Indeed, Congress was so concerned with this type of discrimination that it included a separate title in the Act dealing explicitly with such abuses. Thus, federal courts should be more willing to imply remedies under Title VII than in cases concerned with purely economic matters.

Nevertheless, in defining a prevailing plaintiff in terms of available relief, the *Harrington* court appears to have made a sound decision. The right to some form of relief required by the *Harrington* court must be not only authorized, but also must have existed at the time suit was brought. Both elements of this definition support the congressional policies behind Title VII of encouraging plaintiffs of limited means to bring meritorious suits,[49] deterring parties from bringing suits without foundation,[50] and carrying out the corrective aspects of the Act.[51] If a suit is brought which proves discrimination but for which no remedy can be fashioned under the statute, no corrective aspect is served. Similarly, if a defendant has already ceased the discriminatory practice and back wages are not sought, no corrective aspect is served by

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[43] *Id.*

[44] *Id.*

[45] *See* Cort v. Ash, 422 U.S. 66, 78 (1975) for a discussion of this doctrine.

[46] Cannon v. Univ. of Chicago, 99 S. Ct. 1946 (1979).

[47] Touche Ross & Co. v. Redington, 99 S. Ct. 2479 (1979). *See also* Transamerica Mortgage Advisers, Inc. v. Lewis, 100 S. Ct. 242 (1979).

[48] *See* the remarks of Senator Humphrey cited in note 37 *supra*.

[49] *Christianburg*, 434 U.S. at 418-19. *See* authorities cited at note 12 *supra*.

[50] 535 F.2d at 727, 13 FEP Cas. at 1525.

[51] *See* [1964] U.S. CODE CONG. & AD. NEWS 2401, 2516.

bringing the suit. But if, as in *Parham v. Southwestern Bell Tel. Co.*,[52] the defendant alters its employment practices after suit is filed, and the suit had some causal connection to the alteration, a plaintiff should be awarded attorney's fees. A plaintiff in this situation would have a right to relief at the time suit was brought and the corrective policy is fulfilled. Again, if the suit is settled after filing, as in *Parker v. Califano*,[53] not only is the definition of prevailing plaintiff satisfied, but the congressional policies are fulfilled as well. Thus, the *Harrington* court's definition of prevailing party synthesizes the earlier decisions and, as a technical matter, seems to reach the right result. Those persons being discriminated against and who have a right to relief at the time suit is filed will receive the benefit of the statute, but those whose rights are no longer being invaded at the time of filing will not receive the statutory benefit.

While the technical merit of the *Harrington* decision is unassailable, a question still exists regarding the denial of attorney's fees to persons who prove discrimination yet are not deemed to have been entitled to a remedy at the time suit was brought. The *Harrington* court's definition focuses upon particular cases and does not consider the wider effect which denying attorney's fees to those who merely prove discrimination may have upon persons deciding to bring suits. The decision could well have a chilling effect on the interest that potential plaintiffs seeking the more far-sighted remedies such as various forms of affirmative action will have in bringing suits. In short, the *Harrington* decision adds a new uncertainty to the calculus of determining when and which suits to bring. In addition to uncertainty over the likelihood of proving discrimination, there is now uncertainty in determining the likelihood of attaining relief. The increased uncertainty surrounding an award of attorney's fees could make plaintiffs less likely to bring these suits and attorneys less likely to accept them from clients who cannot guarantee payment of fees. These persons are precisely the persons the attorney's fee statute is designed to benefit.

B. *Damages*

1. *Punitive Damages and Damages for Pain and Suffering: Age Discrimination*

Although the Age Discrimination in Employment Act[1] (ADEA) clearly provides relief for victims of age discrimination,[2] federal courts have differed

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[52] 433 F.2d 421 (8th Cir. 1970). In *Parham* plaintiff was awarded attorney's fees when the court held that his suit had been the catalyst in changing defendant's employment policies. *Id.* at 429-30.

[53] 561 F.2d 320, 333, 18 FEP Cas. 391, 401 (D.C. Cir. 1977).

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[1] 29 U.S.C. §§ 621-634 (1976).

[2] *See* 29 U.S.C. § 626(b) and (c) (1976).

over the availability under the Act of compensation for pain and suffering or punitive damages.[3] At the heart of this judicial controversy lies the proper interpretation of the relief provisions contained in section 7(b) of the ADEA.[4] This section states that enforcement of the ADEA is to be sought in accordance with the powers, remedies, and procedures found in sections 211(b), 216, and 217 of the Fair Labor Standards Act[5] (FLSA), and that amounts owing to victims of age discrimination shall be unpaid wages and overtime, and, in cases of willful violations, liquidated damages.[6] The section also provides courts with jurisdiction to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of this [Act], including without limitation judgments compelling employment, reinstatement or promotion . . . ."[7] Of the three FLSA provisions incorporated into the ADEA, only sec-

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[3] See text and notes at 13-18 *infra*. The two cases discussed in this article involved only the recovery of damages for pain and suffering. See text at notes 20-26 *infra*. However, although pain and suffering and punitive damages are, of course, different remedies, for the purposes of this analysis they shall be treated jointly. The cases dealing with either both of the remedies or just one employ the same type of analysis for determining the availability of each under section 626 of the ADEA. *See, e.g.*, Riddle v. Getty Refining & Marketing Co., 460 F. Supp. 678, 18 FEP Cas. 1072 (N.D. Okla. 1978); Dean v. American Security Insurance Co., 559 F.2d 1036, 15 FEP Cas. 889 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). Presumably, a court's outcome on one of the issues will be determinative of its outcome on the other.

[4] 29 U.S.C. § 626(b) (1976).

[5] 29 U.S.C. §§ 201-219 (1976). Congress did not graft the entire FLSA enforcement scheme on to the ADEA, but rather, selectively incorporated some of the provisions and adopted others with modification. For example, Congress expressly provided for injunctive relief in suits by private litigants, although such relief had been judicially denied under the FLSA. *Compare* 29 U.S.C. § 626(b) (1976) *with* Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959). Furthermore, although liquidated damages are available under both schemes, under the ADEA, unlike the FLSA, they are only awarded when the violation is willful. *Compare* 29 U.S.C. § 626(b) (1976) *with* 29 U.S.C. §§ 216(b), 260 (1976). Finally, the ADEA expressly omitted the FLSA criminal penalty scheme in 29 U.S.C. § 216(a) (1976) in favor of its own separate one in 29 U.S.C. § 629 (1976).

[6] 29 U.S.C. § 626(b) (1976). That subsection specifically provides:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title; *Provided*, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(c) (1976) similarly provides in relevant part that: "Any person aggrieved may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."

[7] 29 U.S.C. § 626(b) (1976).

tion 216 is relevant to the issue of available remedies.[8] Similar to section 7(b) of the ADEA, section 216(b) of the FLSA provides that violators will be liable to victims in the amount of unpaid compensation and liquidated damages.[9]

It is unclear whether the broad statutory allowance of "legal" relief found in subsection 7(b) includes the traditional legal remedies of punitive damages and compensation for pain and suffering,[10] or whether legal relief is limited to the remedies specifically enumerated in section 7(b) of the ADEA and section 216(b) of the FLSA.[11] Thus, courts must decide whether to allow compensatory damages beyond unpaid wages and overtime, or punitive damages beyond the set amount of liquidated damages.[12]

During the *Survey* year, the First Circuit in *Vazquez v. Eastern Air Lines, Inc.*[13] and the Fourth Circuit in *Slatin v. Stanford Research Institute*[14] considered this question and decided that ADEA claimants can recover only lost wages and liquidated damages.[15] In so doing, these circuit courts reached the same

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[8] 29 U.S.C. § 216 (1976). Section 211 deals with the administrative aspects of enforcement, and section 217 discusses injunctive proceedings by the administrative agency. 29 U.S.C. §§ 211, 217 (1976).

[9] 29 U.S.C. § 216(b) (1976) provides in relevant part:

> (b) Any employer who violates the provision of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

[10] *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973).

[11] See notes 6 and 9 *supra* for full text of the subsections.

[12] Liquidated damages are available to the ADEA claimant but only in cases of willful violations of the Act. 29 U.S.C. § 626(b) (1976). The amount of liquidated damages available is limited to the amount of unpaid minimum wages or overtime compensation due the age discrimination victim. *Id.*

[13] 579 F.2d 107, 17 FEP Cas. 1116 (1st Cir. 1978).

[14] 590 F.2d 1292, 18 FEP Cas. 1475 (4th Cir. 1979).

[15] *Vazquez*, 579 F.2d at 111-12, 17 FEP Cas. at 1119; *Slatin*, 590 F.2d at 1296, 18 FEP Cas. at 1478. Also during the *Survey* year, the District Court for the Northern District of Oklahoma, in Riddle v. Getty Refining & Marketing Company, 460 F. Supp. 678, 18 FEP Cas. 1072 (N.D. Okla. 1978), faced with a complaint alleging wrongful termination of employment in violation, *inter alia*, of the ADEA, concluded that punitive damages and damages for pain and suffering are not available under the Act. *Id.* at 680, 18 FEP Cas. at 1073. The *Riddle* court thereby endorsed the approach taken by the majority of district courts. *See, e.g.*, Douglas v. American Cyanamid Co., 472 F. Supp. 298, 19 FEP Cas. 1671 (D.Conn. 1979); Quinn v. Bowmar Publishing Co., 445 F. Supp. 780, 18 FEP Cas. 1468 (D. Md. 1978); Jaeger v. American Cyanamid Co., 442 F. Supp. 1270, 16 FEP Cas. 568 (E.D. Wis. 1978); Catlett v. Owens-Illinois, Inc., 454 F. Supp. 358, 19 FEP Cas. 1664 (W.D. Mo. 1978); Ellis v. Philippine Airlines, 443 F. Supp. 251, 17 FEP Cas. 67 (N.D. Cal. 1977); Travers v. Corning Glass Works, 76 F.R.D. 431, 15 FEP Cas. 584 (S.D.N.Y. 1977); Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499, 15 FEP Cas. 216 (D. Del. 1977); Looney v. Commercial Union Assurance Companies, 428 F. Supp. 533, 14 FEP Cas. 843 (E.D. Mich. 1977); Hannon v. Continental National Bank, 427 F. Supp. 215, 14 FEP Cas. 1364 (D. Colo. 1977); Postemski v. Pratt & Whitney Div., United Technologies Corp., 443 F. Supp. 101, 16 FEP Cas.

practical result as did the Third[16] and Fifth Circuits,[17] the only other circuit courts previously to have considered this question. Nevertheless, the First Circuit in *Vazquez*, in holding that damages for pain and suffering may be found appropriate in the future,[18] took a narrower and more prudent stance than the other three circuits.

This growing judicial trend to deny punitive or pain and suffering damages to victims of age discrimination greatly reduces the amount of relief available under the ADEA. A close examination of the reasoning relied upon in these decisions, however, reveals little support for the complete denial of these forms of relief. As the *Vazquez* court found, the decision to disallow these damages should rest ultimately upon the ability of federal courts to effectuate the underlying objectives of the ADEA without them.[19] Federal courts should not completely abandon any means for enforcing the ADEA without a clear indication of congressional intent.

In *Slatin v. Stanford Research Institute*,[20] Harry Slatin alleged age discrimination in violation of the ADEA.[21] In his prayer for relief, Slatin requested damages for "mental and physical pain and suffering."[22] The district court denied a motion by the defendant to strike Slatin's request for pain and suf-

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565 (D. Conn. 1977); Cobb v. Chevron U.S.A., Inc., 15 FEP Cas. 408 (N.D. Ga. 1977); Fellows v. Medford Corp., 431 F. Supp. 199, 14 FEP Cas. 1156 (D. Or. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329, 14 FEP Cas. 1057 (E.D. Pa. 1976); Sant v. Mack Trucks, Inc., 424 F. Supp. 621, 13 FEP Cas. 854 (N.D. Cal. 1976). *Cf.* Schlicke v. Allen-Bradley Co., 448 F. Supp. 252, 17 FEP Cas. 394 (E.D. Wis. 1978) and Dorsey v. Consolidated Broadcasting Corp., 432 F. Supp. 542, 16 FEP Cas. 231 (E.D. Wis. 1977) (ADEA plaintiffs not entitled to damages for harm to reputation).

But see Morton v. Sheboygan Memorial Hospital, 458 F. Supp. 804, 18 FEP Cas. 525 (E.D. Wis. 1978); Kennedy v. Mountain States Telephone & Telegraph Co., 449 F. Supp. 1008, 17 FEP Cas. 616 (D. Colo. 1978); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 16 FEP Cas. 1084 (E.D. Wis. 1978); Coates v. National Cash Register Co., 433 F. Supp. 655, 15 FEP Cas. 222 (W.D. Va. 1977) (now overruled by *Slatin*, 590 F.2d 1292, 18 FEP Cas. 1475 (4th Cir. 1979)); Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123, 13 FEP Cas. 1447 (N.D. Ill. 1976), *aff'd on rehearing*, 432 F. Supp. 952, 15 FEP Cas. 21 (N.D. Ill. 1977); Walker v. Pettit Construction Co. Inc., 437 F. Supp. 730, 16 FEP Cas. 118 (D.S.C. 1977) (now overruled by *Slatin*); Combes v. Griffin Television, Inc., 421 F. Supp. 841, 13 FEP Cas. 1455 (W.D. Okla. 1976); Murphy v. American Motors Sales Corp., 410 F. Supp. 1403, 12 FEP Cas. 1090 (N.D. Ga. 1976), *rev'd*, 570 F.2d 1226, 17 FEP Cas. 180 (5th Cir. 1978); Dean v. American Security Ins. Co., 429 F. Supp. 3, 15 FEP Cas. 403 (N.D. Ga. 1976), *rev'd*, 559 F.2d 1036, 15 FEP Cas. 889 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Engineering Co.,404 F. Supp. 324, 11 FEP Cas. 776 (D.N.J. 1975), *rev'd*, 550 F.2d 834, 14 FEP Cas. 518 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[16] Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 14 FEP Cas. 518 (3rd Cir. 1970), *cert. denied*, 434 U.S. 1022 (1978).

[17] Dean v. American Security Insurance Co., 559 F.2d 1036, 15 FEP Cas. 889 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See also* Murphy v. American Motors Sales Corp., 570 F.2d 1226, 17 FEP Cas. 180 (5th Cir. 1978).

[18] 579 F.2d at 112, 17 FEP Cas. at 1119.

[19] *Id.*

[20] 590 F.2d 1292, 18 FEP Cas. 1475 (4th Cir. 1979).

[21] *Id.* at 1293, 18 FEP Cas. at 1475.

[22] *Id.*

fering damages for being beyond the scope of the ADEA.[23] On interlocutory appeal, the Fourth Circuit reversed the district court's ruling and held that pain and suffering damages are not recoverable against an employer under the ADEA.[24]

Similarly, the First Circuit in *Vazquez v. Eastern Air Lines, Inc.*, considered whether damages for physical and mental suffering resulting from an employer's age discrimination were available to an ADEA claimant.[25] On interlocutory appeal, the First Circuit reversed the district court's order dismissing defendant's motion to strike the demand for physical and mental suffering damages.[26] While disallowing the damages, the *Vazquez* court nevertheless took a unique approach and did not permanently preclude the recovery of damages for pain and suffering under the ADEA.[27] Rather, given the statutory emphasis on the FLSA enforcement scheme and conciliation, and the fact that age discrimination is generally a product of misconceptions rather than of invidious hostility, the court concluded that such damages are not appropriate at this time.[28] The court, however, expressly reserved the remedy in its judicial arsenal for the possibility that, at some future date, such damages would become necessary to effectuate the goals of the ADEA.[29]

The *Slatin* and the *Vazquez* courts relied upon similar rationales, but arrived at different conclusions as to their effect on the damages issue. Both courts cited the 1978 Supreme Court decision of *Lorillard v. Pons*.[30] In *Lorillard* the Supreme Court considered whether ADEA litigants have a right to a jury trial in the absence of express statutory authorization.[31] In upholding the plaintiff's right to a jury trial, the *Lorillard* Court repeatedly emphasized the ADEA's partial adoption of the FLSA enforcement scheme.[32] The Court found that Congress had deliberately incorporated select provisions of the FLSA into the ADEA.[33] From this the Court presumed that Congress must

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[23] *Id.*

[24] *Id.* at 1296, 18 FEP Cas. at 1478. Slatin's complaint also contained a demand for a jury trial which defendant moved to strike. *Id.* at 1293, 18 FEP Cas. at 1475. The Fourth Circuit denied this motion to strike, holding that the ADEA plaintiff's right to a jury trial had been conclusively established by the Supreme Court in Lorillard v. Pons, 434 U.S. 575 (1978), and by Congress' 1978 amendments to the ADEA, Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(a), 92 Stat. 190, 191 (codified as 29 U.S.C. § 626(c)(2)). 590 F.2d at 1293, 1296, 18 FEP Cas. at 1475-76, 1478.

[25] 579 F.2d 107, 108, 17 FEP Cas. 1116, 1116 (1st Cir. 1978).

[26] *Id.* at 108, 17 FEP Cas. at 1116.

[27] *Id.* at 112, 17 FEP Cas. at 1119.

[28] *Id.* at 111-12, 17 FEP Cas. at 1119.

[29] *Id.* at 112, 17 FEP Cas. at 1119.

[30] 434 U.S. 573 (1978).

[31] *Id.* at 575-76.

[32] *See, e.g., id.* at 582.

[33] *Id.* at 581-82.

have been aware of previous judicial interpretations of these FLSA provisions establishing the FLSA litigant's right to a jury trial, and concluded that Congress must have intended to provide similar rights to ADEA litigants.[34]

The *Vazquez* and *Slatin* courts both relied on the *Lorillard* reasoning in presuming that Congress was also cognizant of the judicial interpretations under the FLSA holding that only amounts owed by the employer and liquidated damages—those forms of relief listed in the statute—were permitted under the FLSA.[35] The *Slatin* court, concluding that Congress must have intended the same result under the ADEA, held that since pain and suffering damages are not allowable under the FLSA, ADEA litigants similarly are barred from requesting such relief.[36] Under this interpretation, the broad statutory language of section 7(b) is in fact limited by the statutory inclusion of the FLSA provisions.[37]

In contrast, however, the *Vazquez* court, mindful of the statutory invitation to courts to grant any necessary legal or equitable relief, pointed out that while Congress knowingly adopted the enforcement scheme of the FLSA, the ADEA also contains language which goes beyond the scope of the FLSA.[38] Reconciling this seeming contradiction, the *Vazquez* court held that the statute dictates that ADEA remedies are to be fashioned with reference only to the FLSA procedures unless those remedies fail to guarantee the effectuation of the Act's broad purposes.[39] The court concluded, therefore, that ADEA courts should defer to, but not be forever limited by, the FLSA remedies.[40]

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[34] *Id.* at 580-81.

[35] *Vazquez*, 579 F.2d at 110, 17 FEP Cas. at 1117-18; *Slatin*, 590 F.2d at 1296, 18 FEP Cas. at 1478.

[36] 590 F.2d at 1296, 18 FEP Cas. at 1478.

[37] The district court in Riddle v. Getty Refining & Marketing Company, 460 F. Supp. 678, 680, 18 FEP Cas. 1072, 1073 (N.D. Okla. 1978) similarly relied upon the reasoning in *Lorillard* to deny pain and suffering and punitive damages to an ADEA claimaint. See note 15 *supra*. The *Riddle* court found additional evidence of congressional intent to deny punitive and compensatory damages to ADEA plaintiffs. In 1978, Congress amended the ADEA to grant an ADEA litigant the right to a jury trial. 460 F. Supp. at 680, 18 FEP Cas. at 1073. The congressional conference report stated, *inter alia*, that:

> The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof or estimate other than by liquidated damages.'

Id. at 680, 18 FEP Cas. at 1073 *citing* H.R. REP. No. 950, 95th Cong., 2d Sess. 14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 528, 535. In the *Riddle* court's view, this comment provided strong evidence of Congress' original intent in passing the ADEA to disallow punitive damages. *Id.* at 680, 18 FEP Cas. at 1073. If the congressional report was as dispositive as the *Riddle* court claimed it to be, however, the Fourth Circuit certainly would have mentioned it in the *Slatin* decision which was decided two months after *Riddle*.

[38] 579 F.2d at 110-11, 17 FEP Cas. at 1118.

[39] *Id.* at 112, 17 FEP Cas. at 1119.

[40] *Id.*

Following their respective discussions of the *Lorillard* case, the First and Fourth Circuits went on to evaluate the utility of pain and suffering damages in effectuating the purposes of the ADEA. In *Vazquez*, the First Circuit noted that the discrimination against workers between the ages of forty and sixty-five, which the ADEA was designed to correct, is the product of misconceptions about the productivity of older employees and, therefore, can be distinguished from the invidious prejudices which are common in other forms of discrimination.[41] Both the *Slatin* and *Vazquez* courts noted that Congress, in order to remedy these incorrect assumptions, had placed the statutory emphasis on educational efforts and voluntary compliance by the employers rather than on "hard-fought lawsuits, with substantial compensatory damages hanging in the balance."[42] Mindful of their responsibility to fashion remedies which effectuate the legislative purpose, the *Vazquez* and *Slatin* courts held that the statutory deference to conciliatory and educational efforts by the Department of Labor, coupled with the limited FLSA enforcement scheme for private litigants if administrative efforts fail, are, by themselves, adequate to accomplish the statutory purpose of eradicating age-based prejudices and misconceptions.[43] Moreover, the *Slatin* court found that this limited enforcement and remedial scheme alone is sufficient to relieve any mental suffering of victims of age discrimination.[44]

It should be noted, however, that while the *Slatin* court relied on this justification to permanently foreclose pain and suffering damages under the ADEA, the *Vazquez* court narrowly held that the efforts of the Department of Labor combined with the FLSA enforcement scheme are sufficient *at this time*.[45] The *Vazquez* court left open the possibility that at some future date, additional remedies would be necessary to guarantee the integrity of the ADEA.[46]

In addition to denying the need of pain and suffering damages, the Fourth Circuit in *Slatin* endorsed the prior finding of the Third and Fifth Circuits that allowance of these damages would "frustrate rather than . . . 'ef-

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[41] *Id.* at 111-12, 17 FEP Cas. at 1119.

[42] *Id.*; *Slatin*, 590 F.2d at 1295-96, 18 FEP Cas. at 1477. *See* 29 U.S.C. § 626(b) (1976) which provides, *inter alia*, that:

> Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion.

[43] *Vazquez*, 579 F.2d at 112, 17 FEP Cas. at 1119, *Slatin*, 590 F.2d at 1296, 18 FEP Cas. at 1477. *See also* Dean v. American Security Insurance Co., 559 F.2d 1036, 1038-39, 15 FEP Cas. 889, 890-91 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 841, 14 FEP Cas. 518, 523-24 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[44] *Slatin*, 590 F.2d at 1295-96, 18 FEP Cas. at 1477. *Accord*, Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 840, 14 FEP Cas. 518, 522-23 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). *Contra*, Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952, 954, 15 FEP Cas. 21, 22-23 (N.D. Ill. 1977).

[45] *Vazquez*, 579 F.2d at 112, 17 FEP Cas. at 1119.

[46] *Id.*

fectuate the purposes' of the Act."[47] In support of this contention, the *Slatin* court found that the provisions of such relief, in the absence of specific statutory guidelines, would inject an element of uncertainty into the conciliation process.[48] In addition, the availability of pain and suffering damages would simulataneously jeopardize the efficacy of the administrative proceedings and increase the likelihood of litigation by discouraging claimants from accepting conciliation agreements which only compensate victims for out-of-pocket losses.[49] Thus, the *Slatin* court concluded that pain and suffering damages are inconsistent with and would actually undermine the ADEA enforcement scheme.

The *Vazquez* court, although agreeing that these damages are unnecessary to effectuate the purposes of the ADEA, specifically challenged this notion that to allow them would undermine the conciliation process.[50] The court claimed that, in fact, they might strengthen the administrative process since currently an employer, aware that the most he stands to lose in private litigation was out-of-pocket losses, might be less inclined to compromise at the conciliation stage.[51] Moreover, in questioning this rationale of limiting remedies in order to encourage conciliation, the court pointed to the current 32% success rate of the conciliation process, and to the very limited compliance effort by the Department of Labor due to its limited resources.[52] Despite its doubts about the efficacy of the conciliation process, however, the *Vazquez* court concluded that, at least for the present, deference should be paid to the congressional emphasis on pursuing voluntary compliance.[53]

It is submitted that the statutory language and the legislative history are ambiguous with respect to the availability of these damages under the ADEA. The language of the ADEA relief provision in section 7(b) simultaneously provides for enforcement in accordance with the FLSA and for the granting of any appropriate legal and equitable relief.[54] These seemingly contradictory provisions create a statute which is unclear on its face.

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[47] *Slatin*, 590 F.2d at 1296, 18 FEP Cas. at 1477-78. *See* Dean v. American Security Insurance Co., 559 F.2d 1036, 1039, 15 FEP Cas. 889, 890-91 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 840, 14 FEP Cas. 518, 522-23 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[48] *Slatin*, 590 F.2d at 1296, 18 FEP Cas. at 1477-78.

[49] *Id.*, 18 FEP Cas. at 1478.

[50] *Vazquez*, 579 F.2d at 111, 17 FEP Cas. at 1118. The District Court for Northern Illinois, allowing these damages, also directly attacked the *Slatin* court's contention that such an award would undercut the conciliation process. Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952, 954-55, 15 FEP Cas. 21, 23 (N.D. Ill. 1977). The *Bertrand* court noted that this contention was predicated upon a judicial fear of abuse by emotional juries or by greedy plaintiffs who have unrealistic expectations or plan to use the threat of excessive verdicts for bargaining leverage. *Id.* The court reasoned, however, that these fears were unfounded because of such existing safeguards as jury instructions and a court's power to reject excessive awards, and that, in any event, these fears did not outweigh the injustice of leaving the injury without an adequate remedy. *Id.*

[51] 579 F.2d at 111, 17 FEP Cas. at 1118.

[52] *Id.* at 111 & n.4, 17 FEP Cas. at 1118 & n.4.

[53] *Id.* at 111-12, 17 FEP Cas. at 1118-19.

[54] See note 6 *supra* for full text of 29 U.S.C. § 626(b) (1976).

The legislative history, like the statutory language, falls short of establishing clear evidence of Congress' intent. The inferences drawn by the *Lorillard* Court concerning legislative intent do not present a definitive basis for denying these damages. It is tenuous to assume that the Supreme Court intended to resolve the important issue of the measure of a plaintiff's damages in mere dicta. Moreover, the *Lorillard* rationale of imputing to Congress knowledge of previous judicial interpretations of FLSA fails to address the statutory language empowering courts to fashion any appropriate legal or equitable remedy.

The proper significance of *Lorillard*, moreover, is in dispute. Because of its ambiguity, the case has been used by courts to strengthen the arguments on both sides of the damages issue. A district court in Colorado, for example, pointed out that the Supreme Court in *Lorillard* emphasized that the term "legal relief" as used in the ADEA was intended to have its well-known common law meaning.[55] Applying this reasoning, the district court found that this meaning includes not only the right to a jury trial, as was determined by the *Lorillard* Court, but also the right to punitive and pain and suffering damages which have been established as legal remedies.[56] This use of the *Lorillard* decision is certainly as convincing as that espoused by the *Slatin* and *Vazquez* courts.[57]

Given this ambiguity within legislative history and statutory language, the most sensible approach toward resolving the dilemma was adopted by the First Circuit in *Vazquez*. The First Circuit recognized in the statute congressional intent that courts defer to the compliance and educational efforts of the Department of Labor and the FLSA enforcement scheme.[58] Yet, the court also read the broad statutory language as directing courts to ensure that these procedures are sufficient to guarantee the integrity of the ADEA.[59] If they are found to be inadequate, the procedures should be supplemented with further legal and equitable relief, such as punitive or psychological damages.[60] The court held:

> While we find that the statutory language, coupled with congressional purpose, indicates the correctness of limiting damages to those provided by the FLSA, we do not suggest permanently foreclosing remedies which might prove essential to guarantee the integrity of the statute. It may be at some future date it will be shown that without a damage remedy the purposes of the Act cannot be realized. We are not, however, faced with that situation today. [footnote omitted].[61]

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[55] Kennedy v. Mountain States Telephone and Telegraph Co., 449 F. Supp. 1008, 1010-11, 17 FEP Cas. 616, 617-18 (D. Colo. 1978).

[56] *Id.*

[57] See text and notes at 36-41 *supra*.

[58] 579 F.2d at 112, 17 FEP Cas. at 1119.

[59] *Id.*

[60] *Id.*

[61] *Id.* With respect to its holding, the *Vazquez* court made an interesting and apt analogy to the fact that a private remedy under section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, was first inferred thirty years after the Act's passage in the case of J.I. Case Co. v. Borak, 377 U.S. 426 (1964). 579 F.2d at 112 n.6, 17 FEP Cas. at 1119 n.6.

This reasoning reflects an admirable degree of judicial resraint and wisdom. The court exercised prudence in not rushing to provide these remedies at this time. After an examination of the efficacy of the conciliatory activities and FLSA remedies, it decided that the congressional purpose of educating rather than punishing violators was best served by disallowing additional relief. Furthermore, a decision to grant such damages cannot be reversed easily. If, however, the emphasis is placed on conciliation and out-of-pocket losses and, at a later date, greater damages prove to be necessary to effectuate the goals of the ADEA, they can be granted at that time.

The *Vazquez* court also exercised forethought in retaining its option to provide additional remedies at a later date. It is conceivable that punitive or pain and suffering damages will become necessary to effectuate the purposes of the ADEA. Such action might be required if long-term statistics reveal that conciliation efforts are mostly unsuccessful and tend to discourage would be claimaints, or if an employer has a history of invidious hostility towards older employees. At that point, effectuating the purposes of the ADEA would require a rethinking of Congress' underlying assumptions about mere ignorance being the source of age discrimination, and additional damages would become appropriate.

From the foregoing discussion, the wisdom and prudence displayed by the First Circuit in *Vazquez* becomes apparent. The court was most alert to its duty to construe the ADEA so as to make effective the congressional purpose. Accordingly, a similarly tempered approach is suggested for the remaining circuits which have not yet had the opportunity to rule on this issue.

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BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW

VOLUME 3, NO. 1 DECEMBER, 1979

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